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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between March 1, and March 29, 1912.

PERRY S. RADER,
REPORTER.

VOL. 241.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. LEROY B. VALLIANT, Chief Justice.
HON. HENRY LAMM, Judge.
HON. ARCHELAUS M. WOODSON, Judge.
HON. WALLER W. GRAVES, Judge.
HON. JOHN KENNISH, Judge.
HON. FRANKLIN FERRISS, Judge.
HON. JOHN C. BROWN, Judge.

ELLIOTT W. MAJOR, Attorney-General.
J. D. ALLEN, Clerk.
JOSEPH H. FINKS, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS.

DIVISION ONE.

HON. WALLER W. GRAVES, Presiding Judge.

HON. LEROY B. VALLIANT, Judge.

HON. HENRY LAMM, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. HENRY W. BOND, Commissioner.

HON. STEPHEN S. BROWN, Commissioner.

DIVISION TWO.

HON. FRANKLIN FERRISS, Presiding Judge.

HON. JOHN C. BROWN, Judge.

HON. JOHN KENNISH, Judge.

HON. JAMES T. BLAIR, Commissioner.

HON. REUBEN F. ROY, Commissioner.

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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

AT THE
OCTOBER TERM, 1911.

(Continued from Volume 240)

THE STATE ex inf. HERBERT S. HADLEY, Attorney-General, v. MISSOURI PACIFIC RAILWAY COMPANY, ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, WABASH RAILROAD COMPANY, PACIFIC EXPRESS COMPANY, and AMERICAN REFRIGERATOR TRANSIT COMPANY.

In Banc, March 1, 1912.

1. **QUO WARRANTO:** Motion for Judgment on Pleadings: Things Admitted and Considered. In *quo warranto*, submitted on a motion for judgment on the pleadings, consisting of the information and return, the court, in arriving at the substantive facts pleaded and proper for consideration upon the motion, takes as true the material allegations in the information admitted by the return, and also as true the material allegations in the return, thereby leaving open for discussion the legal conclusions of either party.
2. **COMBINATION:** Established by Pleading. The mere allegation that a combination exists between two railroad companies is not sufficient to establish such combination.

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3. ———: ———: **Control by Ownership of Stock.** One railroad company cannot in law be said to control another where its ownership of the other's stock, if exercised, can amount to no more than the election of two of its thirteen directors. Nor can a charge of a control and combination deduced from such ownership be considered other than a conclusion of the pleader. Nor does the fact of such percentage of ownership support the conclusion, either of control or ownership.
4. **RAILROADS: Ownership of Stock: Connecting Lines.** The ownership of the stock of one railroad company by another connecting line does not violate the law.
5. ———: **Ownership of Express and Refrigerator Companies.** A railroad company may own the stock of an express company organized as a carrier of express freight, and also the stock of a refrigerator car company which owns cars devised and used for the transportation of products which require refrigeration while in transit. The railroad company could engage in such express and refrigerator transportation business itself, and what it may do directly it can do indirectly by owning the stock of the companies engaged directly in the business. But under the law, it is the duty of the railroad company to permit any express company to operate upon its lines.
6. ———: **Combination: Stockholders in Several Defendant Companies: Not Before Court.** An allegation in the information that certain stockholders own a majority of the stock of one of the respondent railroad companies, which in turn owns some of the stock of the other two railroad companies and of the express company and the refrigerator car company, and that such stockholders have conspired together to control all the respondents, will not justify a writ of ouster against the respondent companies, where such individual stockholders are not made parties, and therefore are not before the court.

Quo Warranto.

WRIT DENIED.

Herbert S. Hadley, Attorney-General, and *John Kennish*, Assistant Attorney-General for the State; *F. W. Lehmann* of counsel.

(1) It is stated by the respondents in their demurrer that the facts stated in the information constitute a cause of action against the respondents sev-

erally, but not jointly with any other respondent. That involves a consideration of the question as to what it is necessary to allege against several respondents when the charge is that they have conspired to do acts which are unlawful. The sufficiency of the pleading in this regard must be determined by the rules in reference to civil proceedings. 2 Spelling on Extraordinary Legal Remedies; *People v. Railroad*, 1 Lans. (N. Y.) 308; *Commonwealth v. Bank*, 28 Pa. St. 391; *State v. Anderson*, 8 So. (Fla.) 1; *State v. Bank*, 10 Ohio, 535; *State v. Hardie*, 1 Ired. (N. C.) 42; *State v. Kupferle*, 44 Mo. 154; *Bishop v. State*, 149 Ind. 223. While the rules of pleading in civil cases have been applied to proceedings in *quo warranto*, yet it is not necessary that there should be stated in the information in detail the acts constituting the usurpations charged. It is only necessary that the respondent should be informed by the information of the franchises alleged to be usurped in terms of sufficient definiteness so that they can properly disclaim or justify. 17 Ency. Pl. & Pr. 458; *Palmer v. Woodbury*, 14 Cal. 43; *People v. Railroad*, 12 Mich. 398; *People v. Insurance Co.*, 15 Johns. 358; *People v. Turnpike Railroad*, 23 Wend. 193; *People v. Niagara Bank*, 6 Cow. 196; *Commonwealth v. Bank*, 28 Pa. St. 391; *People v. Dashaway Association*, 84 Cal. 119; *Territory v. Railroad*, 2 Mont. 109; *Commonwealth v. Sturtevant*, 182 Pa. 332; 2 Spelling on Extra. Leg. Rem., sec. 1851. (2) Where it is charged that a combination or conspiracy has been formed to do an unlawful act, or for an unlawful purpose, it is only necessary to charge the existence of the combination or conspiracy in general terms. 4 Ency. Pl. & Pr., p. 713; *Commonwealth v. Eastman*, 1 Cush. 190; *State v. Parker*, 43 N. H. 84; *People v. Saunders*, 25 Mich. 119; *Hazen v. Commonwealth*, 23 Pa. St. 363. And where a combination or conspiracy is for a purpose which is prohibited by statute, the purpose of the combination need be set out only in

such a manner as to show that it is within the terms of the statute. *United States v. Gardner*, 42 Fed. 831; *Landringham v. State*, 49 Ind. 186; *Cole v. The People*, 84 Ill. 216. (3) The law in relation to conspiracies applies to corporations as to individuals. *Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 670; *Lead Co. v. Paint Store Co.*, 80 Mo. App. 247; *State ex inf. v. Insurance Co.*, 152 Mo. 37; *State v. Standard Oil Co.*, 49 Oh. St. 137; *People v. Refining Co.*, 121 N. Y. 696. The State to maintain a joint action against several corporations charged in an information in the nature of a *quo warranto* to have combined or conspired for the purpose of doing acts or accomplishing results unlawful or prohibited by statute is the settled practice of this court. *State ex inf. v. Packing Co.*, 173 Mo. 356; *State ex inf. v. Tobacco Co.*, 177 Mo. 1; *State ex inf. v. Railroad*, 182 Mo. 284; *State ex inf. v. Standard Oil Co.*, 194 Mo. 124. And the right of the State to proceed against several respondents jointly in an action in *quo warranto*, if the grounds upon which the action is based are common to all, is a general rule of practice. 17 Ency. Pl. & Pr., p. 440; *State v. Kern*, 17 R. I. 395; *Gilroy v. Commonwealth*, 105 Pa. 484; *State v. Simpkins*, 77 Ia. 676; 2 Spelling on Extra. Leg. Rem., p. 1820; *People v. Refining Co.*, 121 N. Y. 696. The ownership by one corporation of the stock of another, whether engaged in the same or different business, is *ultra vires*. *State ex rel. v. United States Bank*, 197 Mo. 600; *Goodland v. Bank*, 74 Mo. App. 367; *Hotel Co. v. Furniture Co.*, 73 Mo. App. 135; *Ollesheimer v. Mfg. Co.*, 44 Mo. 185; *Stone v. Rottman*, 183 Mo. 552. And where one corporation owns stock in another corporation for the purpose of controlling it and accomplishing any result contrary to the Constitution or statutes of the State, such action is not only *ultra vires*, but is against public policy, and renders both corporations subject to an action of forfeiture by the State. *State v. Oil Co.*, 49 Oh. St. 137; *People v. Refining Co.*,

State ex inf. v. Railroad.

121 N. Y. 582; *McCutcheon v. Capsule Co.*, 71 Fed. 787; *Lead Co. v. Paint Store Co.*, 80 Mo. App. 247; *Railroad v. Kentucky*, 161 U. S. 698; *Railroad v. Collins*, 40 Ga. 582; *People v. Trust Co.*, 130 Ill. 268; *Distilling Co. v. People*, 156 Ill. 448; *Milbank v. Railroad*, 64 How. Pr. 29; *Pearsall v. Railroad*, 161 U. S. 646; *State v. Distilling Co.*, 29 Neb. 700. (5) That it was unlawful for the Pacific and Iron Mountain Companies to own stock and bonds in the Wabash Company for any purpose, and particularly for the purpose alleged in the information; that it was unlawful for the Wabash Company to give to its debenture bonds a voting power for any purpose, and particularly for the purpose alleged in the information, and that it was unlawful for the Pacific and Iron Mountain and Wabash Companies to be under one domination and control for any purpose, and particularly for the purpose alleged in the information, is clearly established by the provisions of our Constitution and statutes, and also by the decisions of the courts. Constitution, art. 12, sec. 17; R. S. 1899, secs. 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069; *Railroad v. Wear*, 135 Mo. 265; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Railroad*, 43 Ga. 13; *Railroad v. Kentucky*, 161 U. S. 685; *State v. Vanderbilt*, 37 Oh. St. 590; *Pearsall v. Railroad*, 161 U. S. 671; *Thomas v. Railroad*, 101 U. S. 71; *Trans. Co. v. Pullman Co.*, 139 U. S. 24; *Railroad v. Commonwealth*, 7 Atl. 368; *Railroad v. Commonwealth*, 7 Atl. 374; *Milbank v. Railroad*, 64 How. Pr. 20; *Pearson v. Railroad*, 62 N. H. 537; *State v. McDaniel*, 22 Oh. St. 368; *Railroad Co. v. Wood*, 88 Ala. 630; *George v. Railroad*, 101 Ala. 607; *United States v. Securities Co.*, 120 Fed. 721, 193 U. S. 197; *Clarke v. Railroad*, 50 Fed. 338.

M. L. Clardy, Robt. T. Railey and J. L. Minnis
for respondent.

The railroad companies may own the cars of a refrigerator company or may lease them. If they can better secure the use of the cars and make their operation effective through the instrumentality of an auxiliary company, may they not do so? R. S. 1899, secs. 971, 1035 and 1081. (2) The thing against which the provision of the Constitution and that of the statute are leveled—the specific thing which is forbidden—is a control by one competing line of another competing line of railroad. To violate the law there must be control, and there can be no control of one corporation by another through ownership of capital stock unless such ownership shall involve a majority interest in such capital stock. There is no explanation in the information as to how, if at all, one-sixth of the stock of the Wabash Company controls it, although the general allegation of control is conspicuous throughout the entire information. State v. Railroad, 8 Am. St. 880; State v. Crawfordsville, etc., Tp. Co., 102 Ind. 283; Smelser v. Wayne Tp. Co., 82 Ind. 417; State v. Turnpike Co., 92 Ind. 42; Moore v. State, 71 Ind. 478.

FERRISS, J.—Information in *quo warranto* to oust respondents of their franchises. The case is submitted on a motion for judgment on the pleadings, which consist of the information and the returns or answers of the several respondents.

In arriving at the substantive facts pleaded, and proper for consideration upon this motion, we take as true the material allegations in the information admitted by the answers, and also as true the material allegations in the answers or returns of respondents, leaving open for discussion the legal conclusions of either party. [State ex rel. v. Mo. Pac. Ry. Co., 237 Mo. 338.] Thus considered, the pleadings show the facts as follows:

The three respondent railway companies are Missouri corporations. Both the Missouri Pacific Railway Company (hereinafter called the Pacific Company) and the Wabash Railroad Company (hereinafter called the Wabash Company) own and operate lines of railroad between St. Louis and Kansas City, Missouri; that of the Pacific Company being 283 miles in length, and that of the Wabash Company, 276.5 miles; said roads running west on opposite sides of the Missouri river from St. Charles, twenty-three miles from St. Louis. The Consolidated Wabash Railroad Co., existing under the laws of Ohio, Missouri, Illinois, Indiana and Michigan, owned and operated during the time and events mentioned herein lines of railroad extending from St. Louis east to Toledo, O., Buffalo, N. Y., Pittsburgh, Pa., and Chicago, Ill., aggregating 1699.2 miles, forming continuous lines with the Pacific Company railway.

The St. Louis, Iron Mountain & Southern Railway Company (hereinafter called the Iron Mountain Company) owns and operates a railroad from the city of St. Louis, south, to the southern line of the State, and beyond, forming a continuous line with the Pacific road to and through the State of Arkansas, but said companies are not consolidated.

The respondent American Refrigerator Transit Company (hereinafter called the Refrigerator Company) is an Illinois corporation. It owns cars devised and used for the transportation of products which require refrigeration while in transit, is not a carrier or shipper of freight, and does not contract for carriage of freight. It is not a common carrier, but engages only in the business of leasing its cars to various railway companies, and equipping such cars with ice.

The Pacific Express Company is a Nebraska corporation, conducting the business of carrying express freight as a common carrier over the lines of respondent railroads, and is the only company conducting said

business upon said lines; but said respondent railway companies have not refused to allow other express companies to conduct business over their lines.

The Pacific Company owns a majority of the capital stock of the Iron Mountain Company, and the two companies have their principal officers in common.

The Wabash Company has 331,110 shares of common stock and 140,000 shares of preferred stock, each of the par value of \$100. The company has also outstanding \$30,000,000 of debenture bonds. The holders of the debenture bonds elect six directors, the stockholders elect six directors, and the twelve so elected select the thirteenth director to complete the board.

The Pacific Company owns 20,000 shares of Wabash stock. The Iron Mountain Company owns 65,000 shares of Wabash stock, and \$5,435,000 of Wabash debenture bonds. These debenture bonds were acquired by the Iron Mountain Company originally from the Wabash Company in February, 1890, in lieu of the same number of collateral trust bonds acquired by the Iron Mountain Company from the Wabash, St. Louis and Pacific Railway Company, in December, 1883.

The Iron Mountain Company purchased in the market, in 1903, at the market price, 85,000 shares of Wabash stock, the Wabash Company at that time operating a continuous line east to Toledo, Buffalo, Pittsburgh and Chicago, connecting with the Iron Mountain railway at St. Louis.

The Express Company has 60,000 shares of capital stock, each of \$100 par value. Of this stock the Wabash Company owns 24,000 shares, and the Pacific Company, 12,000 shares.

The Refrigerator Company has 5000 shares of capital stock, of \$100 par value each. Of this capital stock the Pacific Company owns 1217 shares, the Iron Mountain Company, 2,853 shares, and the Wabash Company, 930 shares, making the total 5000 shares.

The information charges that George J. Gould and Frank J. Gould own a large number of shares of the Pacific Company, and have combined and conspired with other stockholders of said company to control and manage the affairs of said company, and, through ownership by the Pacific Company of the majority of the stock of the Iron Mountain Company, to also control the latter company; that the said stockholders of the Pacific Company own and control a large number of shares and bonds of the Wabash Company, and have caused the two first-mentioned companies to own and hold a large number of shares and bonds of the Wabash Company, as stated above, and this as a result of and in furtherance of a conspiracy on the part of such stockholders to bring under one control the Wabash and Pacific Companies, and destroy competition, and also to consolidate the stock, property and franchises of the Wabash and Pacific Companies, which are alleged to be competing and parallel lines, so that they will be one company in effect, so far as public interests are concerned. It is further charged that this result has been accomplished by the means aforesaid.

It is further charged that the aforesaid ownership of stock and bonds of the Wabash Company by the other companies is unlawful, and is a usurpation of franchises not granted by law; also that the aforesaid ownership of stock in the Express and Refrigerator Companies is a usurpation of franchises and rights not granted by law, and that its effect is to render such Express and Refrigerator Companies incapable of exercising their respective rights and franchises.

It is further charged, in conclusion, that all the foregoing alleged unlawful acts have been done by the respondent corporations, their officers and members, in furtherance of and as part of an unlawful conspiracy between the respondents, their officers and members, to destroy all competition between said railway companies, and to destroy all competition between said

Express and Refrigerator Companies and other express and refrigerator companies on the lines of said railway companies, to conduct all traffic over the lines of said railways, including the express and refrigerator business, under one and the same control, and to effect a combination of parallel and competing lines, "to the great injury of the people of the State of Missouri."

The information concludes with the following prayer:

"Wherefore, the Attorney-General, who prosecutes in this behalf for the State of Missouri, prays the consideration of the court in the premises, and that the respondents, the Pacific Express Company and the American Refrigerator Transit Company, be ousted of their franchises, privileges and license to do business in the State of Missouri, and that the same be declared forfeited, and that the respondents, The Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company and the Wabash Railway Company, be ousted of the liberties, franchises, privileges and powers so usurped and unlawfully exercised by them, and each of them, as hereinbefore set forth, and that the court further order, adjudge and decree that the said respondents, the Wabash Railroad Company, the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, discontinue and cease the usurpations hereinbefore set forth, within a definite time, and that failing so to do, all the rights, privileges and franchises of said Wabash Railroad Company, Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company be declared forfeited."

So far as the Express and Refrigerator Companies are concerned, it is not charged in the information that either company, as such, has done anything in violation of its duties and obligations. The only

allegation against these companies is that, in the one case, a majority of the stock, and in the other, the entire stock, is owned by the three respondent railway companies. As to how or when this stock was acquired there is no allegation. There is no complaint that either company is not performing its full duty to the public. There is no allegation of fact tending to show that either company has in any way conspired or confederated with the railroad companies for any purpose whatever; nor does it appear from any allegation in the information that either company is not managed by its own board of directors and in a proper way.

The substantive facts with which we have to deal (laying aside mere conclusions and immaterial and irrelevant allegations), as we glean them from the pleadings, are few in number.

I. The information charges that the Pacific Company, through its ownership of Wabash stock, and through the ownership of Wabash stock and bonds by the Iron Mountain Company, completely controls and dominates the Wabash Company, and has effected a combination and consolidation of the stock, property and franchises of said companies. No further facts being pleaded to support this allegation of combination and control, it must rest solely upon the fact that the Pacific and Iron Mountain Companies own the stock and bonds above set forth. It is obvious, however, that such ownership is far from amounting to control. If such ownership were exercised in combination, it could not amount to the election of more than two of the thirteen directors of the Wabash Company. There is no allegation that the ownership has been so exercised. The mere allegation that there is a combination and control is not sufficient, under our decision in the case of *State ex rel. v. Missouri Pac. Ry. Co.*, supra. We have before us a conclusion of

the pleader, based upon the facts above stated, which facts, as pleaded, do not in our judgment support the conclusion.

It appears from the facts that the Wabash is a connecting line with the Iron Mountain, and therefore the ownership of stock in the former company by the latter does not violate the law.

It is contended by the respondents that inasmuch as the Wabash owns connecting lines from Pittsburg, Toledo and Chicago through to Kansas City, that portion of the line between St. Louis and Kansas City is not a parallel and competing line in the sense in which these terms are used in the statute. We need not decide whether this contention is true. It is obvious that the Pacific Company, owning 20,000 shares of stock in the Wabash, cannot, by reason of such ownership, in any sense control the Wabash Company. Nothing appearing to the contrary, presumptively the Wabash has its own officers and its own board of directors, and it is further to be presumed that such officers and board of directors are performing their duties as such.

II. It is claimed that the railway companies, by their ownership of the capital stock of the Express Company and Refrigerator Company, have usurped the rights and franchises of the latter companies—have violated the law by the ownership of stock in other corporations. Similar questions were presented in the case of *State ex rel. v. Missouri Pac. Ry. Co.*, supra, wherein a similar charge was made against the Pacific Company because of its ownership of stock in a coal company and elevator company. We held in that case that, inasmuch as a railroad company could lawfully engage in mining coal for its own use, and could operate an elevator to handle grain for transportation over its railroad, the railroad company might lawfully own a majority of the stock of such companies. What is there said applies equally well

to both the Express Company and Refrigerator Company in this case. Both companies are engaged in business which the railroad company could carry on itself; and if it could do so directly it may do so indirectly by owning the stock of the companies engaged directly in the business. From the facts stated it does not appear that the ownership of stock in these companies forbids competition in either the express or refrigerator business. Under the law, it would be the duty of the railroad company to permit any express company to operate on its lines, and, under the facts stated, the railroad companies in this case have not refused such right to any other company. It will not be questioned that the railroad companies can own refrigerator cars, and, for reasons stated above, they may own them indirectly through ownership of stock in the company which owns and leases them.

We are unable to find, under the substantive facts alleged in this case, that there is a combination or conspiracy among the respondent railroads to control the entire traffic over their roads, or that the railroad companies have usurped the rights and franchises of the Express and Refrigerator Companies.

III. The State argues that we should disregard the corporate forms, and look to the Goulds and other stockholders of the Pacific Company, who, it is alleged, own a majority of the shares of the Pacific Company, and who, it is further charged, have conspired together to control all the respondents, and to cause to be done all the things complained of herein, and that through such stock ownership, and in pursuance of such conspiracy, these individuals have caused these corporations to do these things. It is sufficient to say that these individuals are not before the court. We have the corporations only. We do not find them guilty of offending the law in the manner charged. We, therefore, give judgment for respondents. All concur, except *Brown, J.*, who dissents; *Kennish, J.*, not sitting.

JOHN SALMON, Plaintiff in Error, v. KANSAS CITY.

In Banc, March 1, 1912.

1. **NEGLIGENCE: Employee of Sewer Contractor: Powers of Supervision Reserved by City: Liability of City for Independent Contractor's Negligence.** Powers of supervision and control as to quality of material and methods of construction reserved to the city engineer in a contract for the construction of a sewer, which specified at length and in detail the work to be done and materials to be used, and required all materials and labor to be furnished and paid for by the contractor, who was to be paid for a completed sewer a lump sum, were reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection, and neither the contractor nor his servants have any ground of complaint because the city failed to exercise such power of supervision; nor could an employee of the contractor, engaged in drilling holes to be charged with dynamite and giant powder by the contractor's foreman, look to the city inspector to protect him from unexploded charges; and if the foreman was guilty of negligence in not informing him that the dynamite in a certain charged hole had not exploded, and in consequence he was injured, he cannot hold the city liable for the foreman's negligence and his consequent injuries, on the theory that the city engineer had very extensive powers of supervision and control over the manner of performing the work. Such reserved powers of control did not authorize the engineer to step in between the contractor and his servants, and direct the servant in the details of his work.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the relation of independent contractor did not exist unless (1) the city selected a competent and fit person, engaged in an independent calling, to do the work; unless (2) the work committed to the contractor was not attended with danger to others, nor unlawful; and unless (3) the contractor was allowed to do the work according to his own methods and only subject to control by the city as to the result of the work. And as the petition charges that the contractor was not competent, skillful or fit, that the blasting of rock in excavating for the sewer was attended with danger to others, and that the contractor was not permitted to do the work according to his own methods, it states a cause of action against the city for the injury to the contractor's servant due to the negligence of his foreman.

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2. ———: ———: ———: **Power to Direct Discharge of Incompetent Workmen.** Nor did a privilege reserved by the city to require the contractor to discharge incompetent workmen prevent the full application of the doctrine of independent contractor, or make the city liable for the injury of one of the contractor's servants due to the negligence of his foreman. Such provision in the contract was inserted to enable the city to secure good work at the hands of competent workmen; not to protect workmen against incompetent foremen.
3. ———: ———: **Liability of City for Injury to Independent Contractor's Servant: Blasting on Public Street: Intrinsically Dangerous.** Holding in view the rule of law that a municipality cannot authorize acts upon a public street which are intrinsically dangerous and which in themselves constitute a nuisance or a menace to the lives and property of others, and that it is no defense to the liability of the city to show that the performance of the inhibited act is delegated to an independent contractor, it is nevertheless *held* that the protection of the rule does not extend to an employee of an independent contractor who is compelled in excavating for the sewer to use dynamite in blasting rock, nor is blasting so intrinsically dangerous that when the city authorizes its use by an independent contractor it becomes liable for resulting injury. The doctrine is applicable to injuries to passers-by or near-by property. It certainly cannot be invoked to hold liable the city when the injury to the servant of the independent contractor was due to the sheer negligence of the contractor's foreman in failing to protect the servant in work which in itself is not inherently dangerous, namely, in permitting the servant to return to drilling holes without discovering and notifying him that the dynamite in one of the holes of a previous charge had not exploded.
Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the contractor is not an independent contractor if he is an incompetent and unfit person, and where he is incompetent and unfit the city is liable for any injuries due to his incompetence, and that the rule applies to injuries to passers-by and to servants of the *pseudo*-contractor, and its protection extends to the one as well as to the other.
Held, also, that the use of dynamite in blasting is intrinsically dangerous, and the city is responsible, as for its own negligence, if it fails to see that the contractor uses such care as the hazard requires.
4. ———: ———: ———: **Incompetent Contractor.** The city owes no duty to the servant of an independent contractor with

whom it has contracted for the construction of a sewer, to provide him a competent and skillful employer. It is no ground for holding the city liable for the servant's injury that the contractor (his employer) was incompetent, or insolvent, and known to the city to be so.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the city does owe to the servant engaged by a contractor to work on a city sewer, the duty to let its contract to a competent and skillful person, and if it fails in that duty it is liable for any injury to such servant due to the negligence of such incompetent contractor or of his foreman.

5. ———: ———: ———: **Failure to Enforce Ordinance: Blasting by Person Not Licensed.** A city is not liable in damages for failure to enforce its ordinances. Liability against the city for injury to the servant of an independent sewer contractor, who was injured by the unexpected explosion of a charge of dynamite used in blasting, cannot be predicated upon the city's failure to enforce an ordinance requiring a license to qualify one to do blasting.

Held, by BOND, C., with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that for negligence and breach of duty in failing to require the observance of its ordinance safeguards against injury, which it contracted should be observed, the city is liable. Where the city's contract with the contractor for a district sewer stipulated and covenanted that each and all of its ordinances applicable to the doing of the work should be complied with, including the ordinance regulating blasting and requiring that only competent and licensed persons should engage in that hazardous work, that obligation inured to the benefit of all persons who would be injured by its breach, and the city is liable to any person injured as a result of the neglect of that duty. Such a cause of action, being based on negligence and a breach of contract, is a very different thing from one originating in a non-enforcement of a police regulation.

Appeal from Jackson Circuit Court.—*Hon. H. L. McCune*, Judge.

AFFIRMED.

N. F. Heitman for plaintiff in error.

(1) The law is strongly and intelligently stated in the leading case of *Linnehan v. Rollins*, 137 Mass.

123. The same principle is applied in *Scott v. Springfield*, 81 Mo. App. 312. The power of control is the cause, the liability of the city is the effect. Liability follows control. An interesting case in point is the *City of Chicago v. Dermody*, 61 Ill. 431. *Joliet v. Harwood*, 86 Ill. 110, is a blasting case. The opinion has been approved and followed in Illinois, and the case has been cited with approval in Massachusetts. *Harding v. Boston*, 163 Mass. 14. The case was approved in *Jefferson v. Chapman*, 127 Ill. 444; *Gas Co. v. Myers*, 168 Ill. 146; *Chicago v. Murdock*, 212 Ill. 12; *Harper v. Milwaukee*, 30 Wis. 365. This last case decides that the fact that the sewer was to be constructed under a contract will not relieve the city from liability if the contractor acted as its agent and subject to its control as to the mode of performing the work. If a public work is constructed under an independent contract (lawfully entered into by the city) the municipal authorities having no control over the mode of doing the work of blasting, then the contractor alone would be liable for such injury. (2) The relation of master and servant exists where the city may select the blasting workmen, and may order not only what blasting work shall be done but the mode and manner of performance. This contract uses this language: Blasting "work to be done in strict obedience to the directions which may from time to time be given by the city engineer or his authorized agents." The Construction Company was not an independent contractor. The word "independent" means "independent" and not "dependent." (3) The contract in this case provides that the contractor should obey all of the ordinances of Kansas City pertaining to the work of blasting. One of these ordinances requires a licensed blaster on the work. Although the city had perfect power of control over this matter of requiring an expert blaster, it neglected to exercise such power of control and

neglected to compel obedience to said reasonable ordinance which became a part of this contract. This negligence of the city was the cause of the injury. The failure to have an expert blaster was a divergence from the contract just as in the Illinois case cited. Another provision of the contract was: "The contractor shall not blast any rock or allow the same to be done on this work without taking such precautions as shall prevent damage and injury to person." The city retained power of superintendence over the blasting and the city had the power to compel the contractor to take precautions to prevent injury to the plaintiff, and had the power and the duty to compel the employment of a licensed blaster. The city negligently permitted a divergence from the contract in this respect. This case is therefore like the Illinois case. The city is not liable for non-enforcement of its ordinances as a general rule, but there is an exception to this rule, and this case comes within the exception, for the reason that in the Donohue case in 136 Mo., sewer construction is held to be the private business of Kansas City, and hence when engaged in that sort of business its ordinances establish a standard of care for it, just like the rules and regulations of the railroad company established a standard of care for the railroad company in the case in 84 Mo. App. The general rule is unquestioned; the exception is just as distinct and clear. *Jones v. City of New Haven*, 34 Conn. 1; *Dickinson v. Boston*, 188 Mass. 595; *Commissioners v. Parks*, 155 Mass. 531; *Jones v. City of New Haven*, 34 Conn. 1; *Cooper v. Seattle*, 16 Wash. 462; *Fink v. St. Louis*, 71 Mo. 52; *Springfield v. LeClaire*, 49 Ill. 476; *Chicago v. Murdock*, 212 Ill. 12; *Wagner v. Rock Island*, 146 Ill. 139; *Fink v. St. Louis*, 71 Mo. 52; *Cooper v. Seattle*, 16 Wash. 462; *Harper v. Milwaukee*, 30 Wis. 365; *Logansport v. Dick*, 70 Ind. 65; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *Jones v. New Haven*, 34 Conn. 1.

John G. Park, John T. Harding, Hunt C. Moore, A. F. Smith and Francis M. Hayward for defendant in error.

(1) The general rule as to third parties is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs such contractor, his subcontractor or his servants committed in the prosecution of such work. 2 Thompson on Negligence, sec. 22, p. 899; Gayle v. Foundry Co., 177 Mo. 446; Crenshaw v. Ullman, 113 Mo. 633. (2) The Construction Company, under the contract set forth in plaintiff's petition, was an independent contractor and though the city had the right to supervise the work, to see it complied with the contract, yet such company represented the employer only as to the result of the work and not as to the means by which it was accomplished. Blumb v. Kansas City, 84 Mo. 112; Crenshaw v. Ullman, 113 Mo. 633; McGrath v. St. Louis, 215 Mo. 211; Ege v. Brick Co., 118 Mo. App. 630; Hobbitt v. Railroad, 4 Exch. 244; Edmundson v. Railroad, 111 Pa. St. 316; Staldter v. Huntington, 153 Ind. 354; Uppington v. New York, 165 N. Y. 222; Frolich v. New York, 199 N. Y. 66; Pioneer v. Hanson, 176 Ill. 100; Casement v. Brown, 148 U. S. 622; Smith v. Milwaukee, 91 Wis. 360; Louisville v. Cheatham, 118 Tenn. 160; Harding v. Boston, 163 Mass. 14; Rogers v. Railroad, 31 S. C. 378; Callan v. Bull, 113 Cal. 593. (3) There is no allegation in plaintiff's petition that said company was an unskillful or incompetent corporation only that it was insolvent and, therefore, an improper corporation to enter into a contract with the city, but an incompetent independent contractor will not as to his employee

take the case out of the general rule. *Schip v. Brewing Co.*, 64 Minn. 22; *Hunt v. Railroad*, 51 Pa. St. 474. (4) Blasting, under the circumstances of this case, is not so intrinsically or necessarily dangerous to third persons as to make the case at bar an exception to the general rule. 12 Am. & Eng. Ency. Law (2 Ed.), 512; 16 Am. & Eng. Ency. Law (2 Ed.), 208; 19 Cyc. 9; 26 Cyc. 1556; *McCafferty v. Railroad*, 61 N. Y. 178; *Blumb v. Kansas City*, 84 Mo. 112; *Edmundson v. Pittsburg*, 111 Pa. St. 316; *French v. Vix*, 143 N. Y. 90; *Symons v. Road Directors*, 105 Md. 254; *Houghton v. Loma, etc. Co.*, 152 Cal. 500; *Kendall v. Johnson*, 51 Wash. 477; *Tebbitts v. Knox*, 62 Me. 437; *Cuff v. Newark*, 35 N. J. L. 512; *Staldter v. Huntington*, 153 Ind. 354; *James v. McMinimy*, 93 Ky. 471; *Wetherbee v. Partridge*, 175 Mass. 185; *Louisville v. Smith*, 134 Ky. 47. Petition alleges that the work was not intrinsically dangerous. Duty of making a place safe in blasting operations is delegable. *Knorpp v. Wagner*, 195 Mo. 637. (5) An employee of an independent contractor cannot recover from the employer of the contractor, even if the work whereby he is injured is intrinsically dangerous. *Peoria v. O'Connor*, 149 Ill. App. 598; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322; *Smith v. Railroad*, 151 N. C. 479; *Avery v. Railroad*, 133 N. C. 130; *Reiley v. Chicago*, 122 Ia. 525; *Engher v. Seattle*, 40 Wash. 72; *Brantrator v. Keokuk*, 108 Ia. 377; *Hanna v. Chattanooga*, 88 Tenn. 310; *Schip v. Brewing Co.*, 64 Minn. 22. (6) The plaintiff's injury was not due to blasting as such, but to the failure to inspect the charges unexploded, and, therefore, collateral to the work and he cannot recover. *Butler v. Hunter*, 7 Hurl. & N. 826; *French v. Vix*, 143 N. Y. 90; *Samuelson v. Cleveland Co.*, 49 Mich. 164; *Lafferty v. Gypsum Co.*, 83 Kan. 349; *Water Co. v. Ware*, 16 Wall. (U. S.) 566; *B. & I Co. v. Ballard*, 53 Tex. Civ. App. 110; *Dill, Mun. Corp.* (3 Ed.), 1030. (7) The city was under no obligation to enforce its own ordinances and

no cause of action arose in favor of plaintiff because of such failure. *Moran v. Pullman Co.*, 134 Mo. 651; *Loth v. Theater*, 197 Mo. 328; *Ryan v. Kansas City*, 232 Mo. 471.

FERRISS, J.—Appeal from a judgment of the circuit court of Jackson county sustaining a demurrer to the petition filed by plaintiff charging negligence resulting in personal injuries. The petition was filed on the 15th day of July, 1905, and covers nearly thirty printed pages. The suit was filed against Kansas City and Robert J. Boyd Paving & Construction Company, but subsequently dismissed as to the Construction Company.

It appears from the petition that on the 13th day of May, 1901, Kansas City entered into a contract with the Construction Company for constructing a district sewer in said city by said company. In the course of the ensuing work plaintiff was employed by the Construction Company as a common laborer, and was engaged in drilling holes for blasting rock which was encountered in the work of excavation. The petition charges that the method of preparing the blasts was as follows: The drillers, of whom plaintiff was one, would drill a series of holes about two feet apart, after which such holes would be loaded with giant powder or dynamite by one Kelleher, foreman, and one Moriarity, designated as the powder man, employees of the Construction Company, who would then shoot said holes by means of fuses; that it was usual and customary to count the number of holes in a given series before exploding same, then count the explosions to see whether they corresponded with the number of holes, and afterwards to inspect and examine the holes so exploded for missed shots; that the plaintiff and his gang had nothing to do with the loading or exploding of the holes, nor with the subsequent inspection, but that after the holes had been exploded and inspected plain-

tiff and his gang would be ordered to drill another series of holes; that on the afternoon of Saturday, July 13, 1901, a series of holes which had been drilled by plaintiff were attempted to be exploded by the said foreman and powder man; that on the following Monday plaintiff and his gang were ordered by foreman Kelleher to go back to the place where such series of holes had been exploded to drill a new series; that one hole of the former series remained unexploded, and that while at work drilling the new series a driller who was working near plaintiff caused said unexploded shot to be exploded with such force and violence as to seriously injure the plaintiff.

The plaintiff makes the proper averments to negative any contributory negligence on his part.

There seems to have been no controversy as to the liability of the Construction Company for the negligence of its superintendent. The real controversy in the case is whether Kansas City is liable. The petition proceeds upon the theory that because of the power of control reserved in the contract to the city's engineer, the Construction Company was not an independent contractor, and, hence, the city is liable. In stating below the substance of the petition, we adopt the italics as they appear in the abstract filed by plaintiff. We do not apprehend that these italics appear in the original contract, but use them because they indicate the parts of the contract on which the plaintiff particularly relies.

Plaintiff alleges that the city ordered the construction of the sewer; sets out certain ordinances of the city which provide for the appointment of a city engineer whose duty it should be "to supervise the construction of public and district sewers;" also to prepare plans, specifications and estimates of the cost of all public and district sewers ordered by the council; to report to the board of public works all violations of any contract; to sign all contracts on behalf of the

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city for public improvements, and to superintend their execution. The petition sets out section 883 of the Revised Ordinances of Kansas City for 1898, as follows:

“Permit for Blasting:—No person shall do or cause to be done any blasting within the city limits without *first obtaining from the city engineer a permit therefor*, which shall be issued only on condition that the *city engineer* is satisfied that the applicant is in every particular a safe, careful and suitable person to use, and an expert in the use of, all explosives used in blasting, but *no permit shall, under any circumstances, be issued to any one* until the applicant therefor has entered into a bond to Kansas City in the sum of not less than one hundred dollars or more than ten thousand dollars, as the city engineer may require, with at least two securities, to be approved by the city comptroller, conditioned that *such person will carefully and prudently use such explosive*, and will pay any and all damages caused *any person* by the use thereof. And *any person* can sue on such bond in his own name for any damage caused him by the use of *such explosive*.”

The petition sets out *in haec verba* the contract between the city and the Construction Company. This contract is extremely lengthy, is in the usual form of municipal contracts for public works, giving specifications as to the character of the work to be done, materials to be used, all under the supervision of the city engineer. The contract provides that the party of the first part (the Construction Company), having made the lowest bid, agrees to complete the work in a substantial and workmanlike manner, “in conformity with the plans of such work on file in the office of the city engineer of Kansas City, *in strict obedience to the directions which may from time to time be given by said city engineer* or his authorized agents, in accordance with the following specifications.” The specifica-

tions provide: "*The contractor shall not blast any rock or allow the same to be done on this work without taking such precautions by covering or otherwise as shall prevent damage or injury to person or property;*" that streets and alleys shall be restored "*to the satisfaction of the engineer,*" surplus earth to be removed to such distance "*as may be designated by the engineer;*" the foundations of the sewer to be either of broken stone, plank, concrete or masonry, as shall be "*ordered by the city engineer;*" the location of manholes and catch basins to be changed, or omitted altogether, "*if deemed best by the city engineer;*" no broken bricks to be allowed, "*except for closures, or as shall be otherwise specially directed.*" Then follows a specification as to the character of cement to be used, providing certain tests to be conformed to, "*except in such portions of the work as the city engineer may otherwise direct.*" The character of the concrete is specified, also the manner of preparing it, "*unless otherwise ordered by the city engineer;*" house connections to be worked into the brick work "*in such manner as the engineer may direct;*" the masonry work to be suspended during the freezing weather, "*but the city engineer shall have the right to direct that the work shall be continued under such conditions as he shall prescribe;*" also that during a suspension of the work from any cause, the same shall be suitably covered and the trenches filled "*if the engineer so directs;*" the syphon trap used to be satisfactory "*in the opinion of the city engineer.*" Then follows a specification as to maintenance; the sunken trenches to be immediately filled, and if on a paved street, the pavement to be repaired by the contractor at his expense, "*on receipt of notice from the city engineer so to do;*" that if the contractor fails to comply with said "*notices from the city engineer for two days, then the city may cause the work of grading*" to be done. Then follow some general specifications: "2. The

first party shall commence work at such points as *the engineer may direct*, and shall conform to *his directions* as to the order of time in which the different parts of the work shall be done, as well as to *all his other instructions as to the mode of doing the same.*" The next paragraph provides that if the contractor is not present, orders shall be given to the superintendents in charge, and by them received and obeyed, and that "*if any person employed on the work shall refuse or neglect to obey the directions of the engineer, or his duly authorized agents, in anything relating to the work, or shall appear to the engineer to be incompetent, disorderly or unfaithful, he shall upon the requisition of the engineer be at once discharged and not again employed on any part of the work.*" It is further provided that "*the engineer shall be the judge*" of any work that may be included in the contract by implication; also that the contractor shall do such extra work as "*the engineer may specially direct,*" and that if the price for same is not stated in the contract, the price *shall be fixed by the engineer;*" next, that the contractor shall, "*upon being so directed by the engineer,*" remove, rebuild or make good, at his own cost, any work which the "*latter shall decide to be defective.*" The work is to be begun within ten days unless "*the engineer shall specially direct otherwise in writing.*" Provision No. 8 is, that, if "*in the opinion of the engineer*" the work is not being prosecuted with sufficient force, the engineer may notify the contractor to employ such additional force "*as he deems sufficient,*" and upon failure to comply with such notice, "*the engineer may put on such additional force at the cost of the first party; or he may, at his option, declare this contract annulled; and the power is reserved to the city engineer by Kansas City to suspend or annul this contract, or to suspend the doing of any work thereunder,*" for any failure on the part of the contractor to fulfil same, and the decision of the engineer

is to be conclusive. The contractor is required to observe all city ordinances in relation to obstructing the streets, maintaining signals, keeping open passageway and protecting same, "*and generally to obey all laws and ordinances controlling or limiting those engaged on the work.*" Then follows a clause by which the contractor agrees to indemnify the city and save it harmless on account of any injuries or damages received or sustained by any party or parties by the acts of the contractor. Next is a provision that "the city engineer shall, in all cases, determine the amount and quality of the several kinds of work" to be paid for, and that "he shall decide all questions which may arise relative to the execution of the contract," and that "his estimates and decisions shall be final and conclusive." It is further provided that the contractor "*is subject to the city charter and ordinances in general.*" Then follows the agreement as to prices to be paid for the work, among others, "for each cubic yard of *solid rock excavated;*" then a provision that no payment is to be made until the work has been completed "*to the satisfaction of the city engineer,*" and that there will be used brick only which has been approved "*by the city engineer.*"

This contract was entered into by the Construction Company, as party of the first part, the National Surety Company, party of the second part, and Kansas City, party of the third part; the National Surety Company being surety for the contracting company for the faithful performance of the contract. The said party of the second part agreed "*that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract;*" and further agreed that the work was to be begun within ten days, "*unless the city engineer shall specially direct otherwise.*" The contract is signed by the city engineer on behalf of the city, and was duly approved and confirmed by the city council.

The petition, after reciting the contract, proceeds to aver that the work of constructing said sewer was commenced and prosecuted by *defendants*, and that the defendants and each of them had in their employment, and under their superintendence and control, a gang of men to which plaintiff belonged, and that the foreman, Kelleher, was a vice-principal of defendants.

The various specifications of negligence charged against the city are scattered through this lengthy petition in a somewhat confused and inconsequent manner. We have, however, carefully analyzed the same, and find the specifications of negligence may be stated as follows:

1. That the defendants knew, or might have known by the exercise of due care, that there was an unexploded shot in one of the drill holes, but that they negligently and carelessly failed to remove said danger or to warn plaintiff thereof, and negligently ordered plaintiff and his gang to go to said place and drill a new series of holes in close proximity to said unexploded charge.

2. That the injury to plaintiff resulted from the immediate carelessness and negligence of the foreman, Kelleher, and the powder man, Moriarity, who were working under the direction and control of the defendants; that they were not safe, careful or suitable persons for the performance of their duties; were not experienced, and were not competent; that the defendants knew of such incompetency, and were negligent in entrusting them with the work, and that defendants knew that Moriarity was utterly incompetent.

3. That the defendants negligently and carelessly failed and refused to obey the terms of section 883 of the ordinances, set out above, and that they carelessly and negligently violated said ordinance, in that they failed to compel a compliance with said ordinance, which required them to employ expert licensed blasters; that the blaster employed by them was incom-

petent and non-expert, and had no license; that it was within the power, and it was the duty of the city, in the exercise of its reserve power and control over the work, to see that no person should be permitted to do said work of blasting except one qualified under said ordinance, and that the blaster who was employed had not qualified under said ordinance.

4. That the city reserved and had the power to direct and control the manner of performing said work of blasting, and to direct and control all the workmen, and was careless and negligent in failing to exercise such power and control, and negligently caused the same to be done without reasonable care and prudence, and that the defendants were negligent in failing to superintend and control the manner of performing said work of blasting in all its details; that the engineer had the power and authority to control and direct all the workmen as to the manner of doing the work, and especially the manner of doing said work of blasting, but negligently failed to exercise such control.

5. That said series of holes to which said unexploded shot belonged was excessively, unusually and unreasonably large in number, and that the foreman and powder man were negligent in attempting to explode same at one time.

6. That the defendants were careless in failing to provide and use on said job reasonably safe explosives or safe and suitable fuses.

7. That defendants were negligent in failing to provide said foreman and powder man with proper, usual and reasonable tools and instruments with which to search and examine for unexploded powder.

8. That defendants negligently failed to provide said foreman and powder man with proper, usual and reasonable tools and instruments for cleaning out old drill holes and removing powder from unexploded

charges or missed shots, and failed to provide any tools or instruments whatever for said purpose.

9. That the Construction Company was at the time of entering into said contract a corporation organized under the laws of Missouri; that it was an insolvent and irresponsible corporation, and was not a fit, proper or suitable corporation for the city to enter into said contract with, and that said defendant city was negligent and careless in entering into said contract with said Construction Company, in that said company was an insolvent, irresponsible company, and not a fit, proper or suitable corporation for said work, and that the defendant city, at the time of entering into said contract, and throughout the performance of said work, had knowledge of the foregoing facts, or by the exercise of ordinary care would have had knowledge thereof.

10. That said engineer had authority and power to cause the discharge of all incompetent, disorderly and unfaithful servants engaged on said work, and was negligent in failing to cause the discharge of said foreman and powder man, and, further, in failing to cause the selection and employment of a qualified blaster—one qualified under the terms of section 883 of said ordinance.

11. That the defendants and each of them failed to use reasonable care to provide plaintiff with a reasonably safe place in which to work, and negligently failed to use reasonable care to keep said place of work reasonably safe.

It is further averred in said petition that explosives could be used for blasting in said sewer only by an expert, and that such work required special ability, skill and training; that said unexploded charge was not a risk necessarily incident to said employment; that it was a danger which "could have been obviated by the adoption of reasonable measures of precaution by the defendant, and that the defendants negli-

gently failed to take usual and reasonable measures of precaution to guard plaintiff against said danger;" that the risk was not necessarily liable to happen on account of the nature of the business, and was not naturally incident to said employment, where reasonable care was used by the superintending powers to avoid the danger of such unexploded charges; that unexploded shots of that character "are not usual or ordinary risks in sewer construction business in Kansas City or elsewhere, where reasonable care was used by the superintending powers to avoid such danger." It is further averred that said risk was created and continued by the negligence and carelessness of the defendants, and could have been obviated, removed and avoided by the use of reasonable care on the part of defendants, which care defendants negligently failed to use; that "it was through the immediate negligence and carelessness of said foreman, Kelleher, and said powder man, Moriarity, that said unexploded shot was left existing unexploded, unsearched for and unremoved from said place."

It is apparent from reading the contract incorporated in the petition, and above abstracted, that the actual work of constructing the sewer was performed by the employees of the contracting company which, under the contract, furnished the labor and material; so that wherever in the petition the plaintiff speaks of the defendants, including the city, it is not intended to be asserted that the city was in actual, physical charge of the details of the work, but that by operation of law the employees of the contracting company were the servants of the city; so that, in so far as the pleader charges negligence upon the city, it is a legal conclusion.

The above specifications of negligence charged against the city, with the exception of numbers 3 and 9, may be grouped together for the purposes of this discussion. The liability of the city predicated upon

them is made by the plaintiff to rest upon two propositions: (a) That the control and direction of the work reserved to the city by the terms of the contract negative the theory that the Construction Company was an independent contractor so far as concerns the acts of negligence alleged to have caused the injury to plaintiff, and made the city directly responsible, as master, for such negligence; (b) that owing to the dangerous nature of blasting, the defendant city was under obligation, as a matter of law, independent of the terms of the contract, to see to it that proper precautions were taken to protect plaintiff. This latter proposition is not clearly developed in the petition, but it has been fully argued by both sides, and as the petition could be amended, if necessary, it is in the case and should be disposed of.

I. The petition proceeds upon the theory that under the contract between the city and the Construction Company, the city reserved the direction and control of the immediate acts which, because of their negligent performance, resulted in injury to plaintiff, and the city is therefore responsible for such acts.

As the material parts of the contract are set out *in haec verba* in the petition, the court will look to the contract itself and construe it according to its terms, regardless of the construction placed upon it by the pleader. Following settled rules of construction, we consider the circumstances of its creation, the object sought to be accomplished, and the terms of the entire instrument. So considered, does a fair construction of this contract sustain the contention of plaintiff? Counsel for plaintiff asserts in his brief as his basic propositions the following: "The contractor was not independent as to blasting. As to blasting, the contractor was subservient and was completely under the power of control of the defendant. As to blasting, the relationship of principal and agent subsisted be-

tween the city and the alleged contractor. The contractor was insolvent and incompetent, and had not qualified to do blasting, and had no person in its employ competent to do blasting. The defendant reserved and assumed absolute control over the blasting. Responsibility follows from the defendant's power of control over the blasting. Responsibility follows control."

Leaving the question of the alleged incompetency of the contractor for later discussion, we will consider the contract. It is in the usual form of contracts for municipal public works, specifying at length and in detail the work to be done and materials to be used, all material and labor to be furnished and paid for by the contractor, who is to be paid for a completed sewer a lump sum to be ascertained by the dimensions thereof. In order to secure a satisfactory job, the owner (Kansas City) reserves to its engineer large powers of supervision and control as to quality of material and the method or mode of construction. Obviously, however, these powers are reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection. Neither the contractor nor his servants would have ground for complaint should the city fail to exercise such power of supervision. The engineer assumed no duty to plaintiff by the terms of the contract. The plaintiff did not look to the city inspector to protect him from unexploded charges. His reliance was on the foreman employed by the contractor. The contract must be construed as a whole, not upon detached phrases which in themselves in a proper relation might be apt enough to sustain plaintiff's claim. Taken as a whole, it is plain enough that the powers given to the city engineer are solely for the purpose of securing compliance with the specifications provided in the contract. By no fair construction can the provision authorizing him to direct the mode of doing the work

be held to mean that it is his duty to step in between the contractor and his servant, and direct the latter in the details of his operations. The provisions emphasized by the pleader, taken as a whole, and considered in connection with the entire instrument, cannot modify the view above expressed. Fairly construed, such provisions do not prevent the full application of the doctrine of independent contractor to the Construction Company. The right to require the discharge of incompetent workmen is a privilege retained by the city for its protection. This provision is inserted to enable the city to secure good work at the hands of competent workmen; not to protect employees against incompetent foremen. The city has no power to discharge directly an employee of the contractor. A contract of this character was construed in *Blumb v. City*, 84 Mo. 112. In that case we said of a similar provision: "It did not give the engineer or the city the right to discharge them, and this permission had no reference to the manner of doing the work, but only to the workmanship, the character of the work and the quality of the materials used." The nature of such supervision reserved by the owner is aptly defined by the Supreme Court of Michigan in *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164. In that case a mine owner let the operation of his mine to a contractor, who was to mine and deliver the ore to the owner at a specified price per ton. It would seem to have been conceded that the written contract created the relation of independent contractor. A miner employed by the contractor was injured by a falling roof, improperly supported. The employee sued the owner, and relied upon this clause in the contract: "The making of it (the mine) safe hereby devolving on said first parties (contractors) under the supervision, advice and direction of said superintendent" (for the owner). The court said: "The (mine) owner assumed towards no one the duty

to supervise; he does not stipulate to supervise; he only contracts for a privilege. If the mine owner in this case had dismissed the superintendent and sent no one to inspect the working, no miner could complain that a duty owing to him was being neglected." Further, it was said that the inspection by the owner was for the purpose of protecting his own property. In the same case it was said that if the mine had been in an unsafe condition at the time it was handed over by the owner, he might have been liable on the theory that he invited others into unsafe premises without warning of the danger.

In the case at bar the contract does not authorize the city to give direct orders to the workmen. The city does not hire them nor pay them. The liability of the master for the negligence of his servant arises from the fact that he selects the servant with a view to his skill, and is therefore responsible for such selection. There is no such basis here for imputing responsibility to the city.

In the case of *Carman v. Railroad*, 4 Ohio St. 399 (cited by plaintiff), discussing whether the owner or contractor is liable, the court suggests this distinction: "In the one case, the principal (owner) selects the servant or agent with a view to his skill and care, and not only retains the control over all his operations, but also has the power to dismiss him at any time for misconduct. In the other, the contractor assumes this position, leaving the employer no control over the work or the persons by whom it is executed, but simply the right to require the thing produced, or the result attained, to be such as the contract has provided for."

A contract similar in general character to the one before us, but in some respects giving greater power to the engineer, was construed in *Norwalk Gas Co. v. Borough of Norwalk*, 63 Conn. 495. The petition sought to hold the borough liable for injuries resulting from negligent blasting in the construction of a

sewer at the hands of a contractor. It was contended there, as it is here, that in regard to the blasting the contractor was not independent, and that by the reservation of control in the contract, the borough assumed the responsibility for the acts complained of, namely, the manner of blasting. The contract provided that certain rock should be excavated "with as little blasting as possible, and *under the immediate supervision and direction of the engineer* for the borough, or his assistant" (italics ours); that "if any person employed by the contractor on the work shall appear to the engineer to be incompetent or disorderly, he shall be discharged immediately on the requisition of the engineer." Commenting on this contract, the court says: "But on the whole we are inclined to think that the weight of authority upon the question justifies us in holding that the reservations of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labor, especially in the particulars in the execution of which the plaintiff claimed that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant, and that these considerations relating to general control constitute the true test by which to determine whether the relation be that of employer and contractor or that of master and servant."

There is no claim in the petition in the case before us that the city, through its inspectors, in fact directed the acts which it is alleged caused the injury to plaintiff.

In *Foster v. City of Chicago*, 197 Ill. 264, it was insisted that the city was liable for an injury received

by a servant of the contractor engaged in excavating for a sewer, and due to improperly protecting the walls, on the ground that under the contract the city "remained in a position of control." The contract is not set out in terms in the report of the case, but enough appears to show the relation of what was said by the court to the question under discussion. The language of the court is so apt in this regard that we quote it at some length:

"It is true that the contractor agreed to perform all the work 'under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval and acceptance,' but the work he agrees so to perform is that prescribed in the contract, and it is evident, we think, that this direction and superintendence relate to results—to the character of the workmanship—and not to methods, unless by the use of improper methods the character of the workmanship was rendered unsatisfactory. . . . The contract does not include the direction, management and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employee. He was an independent contractor, the city retaining such supervisory power as it might, from time to time, find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby. The contractor employed and paid his own laborers. The deceased was his employee. The difference between an independent contractor and a mere servant is not determined solely by the retention of a certain kind or degree of supervision by the employer. It is to be determined by the contract as a whole—by its spirit and essence—and not by the phraseology of a single sentence or paragraph. Being a contractor, and not a mere servant of the city,

the latter cannot be held liable for his negligence in the performance of his work. . . .

"This is not a case where a party, when passing along or using a public street, has been injured because of the negligence of the city in permitting or causing a sewer to be constructed or other work to be carried on in such a street, creating a danger to passers-by for which proper safeguards have been negligently omitted. In *City of Springfield v. Le Claire*, 49 Ill. 476, cited by the appellant's counsel, the question was whether there was a duty resting upon the city growing out of the franchise conferred upon it to keep its public streets in a safe condition for the passage of travelers and others having occasion to use them, and the question was properly answered in the affirmative. But the deceased in the case before us was not a passenger or a traveler over the street when injured, and there is no analogy between the case so cited, or others of like character referred to by appellant's attorneys, and the circumstances of the case at bar."

We rule against the plaintiff on the proposition that the contract reserved to the city the control of the acts complained of.

II. It is urged that even if the city is not liable by contract, it is still liable because of its failure to perform a duty to plaintiff imposed upon it by law; that blasting is so intrinsically dangerous that it becomes the duty of the city, when it authorizes its use in public work, to guard third persons, *including the servants of an independent contractor engaged in the work*, from the incidental danger. The industry of counsel for plaintiff in error has brought to our attention numerous cases, as well as conclusions of text-writers, recognizing that the law imposes upon municipalities and owners of property certain obligations toward others which cannot be escaped by interposing an independent contractor as the active doer of the

things complained of. Owners have been held liable to servants of a contractor for hidden intrinsic dangers lurking in premises upon which others are invited, without warning, to work. [Clark v. Railroad, 234 Mo. 396; Young v. Waters-Pierce Oil Co., 185 Mo. 634; Ryan v. Transit Co., 190 Mo. 621; Calvert v. Springfield Light Co., 231 Ill. 290.] Also private owners, and municipalities as well, have been held liable for the consequences of acts which they have authorized and which are intrinsically dangerous to others, no matter how carefully performed, where the danger arises from the act itself and not from the manner in which it is done. We have to do with the proposition last stated, and particularly as applied to the liability of a municipality authorizing blasting in a public street by an independent contractor. The liability of the municipality and that of a private owner rest upon the same fundamental proposition, namely, that one must not authorize acts upon his property which in themselves constitute a nuisance or a menace to the lives or property of others; and it is no defense to show that the performance of the inhibited act is delegated to an independent contractor. The city is also under obligation to keep its streets safe for travel.

It is said that blasting is intrinsically dangerous, and that therefore the city is liable for injury resulting therefrom. The doctrine as laid down in this regard by the authorities is that the city cannot escape whatever duty arises from the use of this dangerous agency by delegating the act to an independent contractor. As to the extent of the duty imposed upon the city the authorities are not uniform. It has been held that this duty is to use due care only to prevent injury. [Booth v. Railroad, 140 N. Y. 267.] It has also been held that in some instances, where blasting is done in the street, the city is liable in any event, and cannot defeat a recovery by showing due care. We are not called upon to lay down an exact rule on

this point, because whatever duty the city owes it owes to the public and not to the servants of the contractor. This is not a case of imperfect appliances furnished by the city, nor one of inviting persons into premises unsafe at the time of the invitation. It is a case where liability is claimed because of the intrinsic danger attending the use of explosives. No text-writer and no case cited extends the protection of this doctrine to an employee of the independent contractor. We have examined the numerous cases cited by plaintiff to support the proposition that blasting is so intrinsically dangerous that when the city authorizes its use by an independent contractor, it becomes liable for resulting injury. We may concede that these cases properly declare the law without approaching the question involved in the case before us. All of the cases relied upon deal with injuries inflicted upon persons disconnected from the work, as for instance, passers-by on the street or adjacent property-owners, and where the injury results from the violent expulsion of rock or earth incident to a blast. No man can tell where a rock hurled into the air without direction will fall, and therefore danger to persons and property in the vicinity is to be anticipated, and so far as possible to be guarded against.

The doctrine of the cases referred to has no reference to a servant of the contractor engaged in blasting; certainly not when, as here, the injury to the servant results from the sheer negligence of the contractor or his foreman in failing to protect the laborer in work which in itself is not inherently dangerous. The drilling of a hole for a charge of dynamite is certainly not an inherently dangerous task. The negligence of the foreman, which it is charged was the immediate cause of the injury, was not the natural and obvious result of blasting; so that even if the doctrine of cases involving the rights of outsiders be extended to the servant of the contractor, the servant in this case

would not come within the rule. It cannot be said that because the city is liable to adjacent persons and property, when it authorizes the use of an inherently dangerous agency (which is the doctrine of the cases relied on), therefore any employee engaged in the quarry may hold the city for any negligence of the contractor or his foreman. Counsel confuses the case of the servant of the contractor, who is injured by reason of the negligent manner in which the blasting is done, with the case of a third person on the street who is injured by the blast itself, without reference to the manner in which the blast is set free. In the latter case the injury results from violent expulsion upon the street and adjacent property of rock and earth authorized by the city. This expulsion of rock and earth occurs in the proper execution of the work. The plaintiff was not injured in the proper execution of the work, but solely by reason of the negligent manner in which it was performed, i. e., the negligent failure to detect the unexploded charge. It does not appear that the plaintiff was in any danger from the proper explosion of a blast. Indeed, such danger is expressly negatived in the petition, which avers that the danger was not a necessary one, nor incident to the work in which plaintiff was engaged.

In *Missouri Valley B. Co. v. Ballard*, 53 Tex. Civ. App. 110 (a case in point upon the facts), the servant of the independent contractor sued the owner. The court, after stating the general doctrine of liability of the owner to the public, says: "The exception within which the verdict of the jury has brought this case finds its best illustration in those cases where public streets have been made dangerous by excavations or otherwise, and where in the nature of things the safety of the traveling public has been endangered, unless needed precautions have been taken to prevent it. In such a case, as has been often said, the injuries are the direct result of the very thing which

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the employer authorized to be done, and he cannot, therefore, escape liability by farming out the work to an independent contractor. It is in the nature of a nondelegable duty, owing to those whose life or limb is thus jeopardized. But where, as here, the injury is the result of an act or fault purely collateral to the work to be done, and is the result entirely of the wrongful act of the independent contractor or his workmen, the employer should not be held liable."

If the owner directs the contractor to perform an act which is dangerous to others, even if carefully performed, he is liable to others for the consequences. In such case the injury results, not from the mode in which the act is done, but from the doing of the act by the most careful mode. The danger is incident to the act itself; hence, the owner is responsible for the consequences of the act. On this principle rest the numerous decisions in cases where blasting throws rocks which cause damage. As was said by the Supreme Court of Arkansas in *Railway v. Yonley*, 53 Ark. l. c. 508: "If one employs another to perform a work which from its nature is necessarily dangerous to the property of a third person, the employer cannot escape liability for the injury thereby done. In such cases the injury flows from the doing of the act as its natural consequence, and not from the manner in which the act is done." But aside from the differential facts above referred to, the doctrine of liability of the city to outsiders, supported by plaintiff's cases, is not extended by either reason or authority to include the servant of the contractor. If the foreman himself had been injured by his own negligence averred in the petition, it would hardly be claimed that the city would be liable; yet the doctrine for which plaintiff contends would protect the foreman, or even the contractor himself, from the consequences of his own negligence. It would be a strange anomaly in jurisprudence were we to hold that an employer is

liable to the servant of an independent contractor because of the negligence of the contractor or his foreman in the performance of some casual act in the course of the work. The owner owes no legal duty to such servant to protect him from the negligence of his foreman. There is no parallel between the relation of the city to plaintiff and its relation to the public and adjoining owners. In the case of *Loth v. Columbia Theatre Co.*, 197 Mo. 354, we refused to apply the doctrine of independent contractor where a passerby was injured by the lowering of a large sign, but we said: "The injury in the case at bar resulted directly from the acts called for and made necessary by the contract, that is, the changing and replacing of the sign, and not from the acts which were merely collateral to the contract, and if by the negligence and carelessness of the men handling the sign it fell upon and injured plaintiff, the company is liable as if it had directly performed such acts." But supposing the sign, through careless handling, had injured one of the workmen engaged in the work, would it be claimed that the owner was liable?

The true rule of liability is thus stated by Dillon in his work on *Municipal Corporations*, sec. 1723, vol. 4. "*Where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable.*"

The authorities cited by plaintiff are in line with this statement of the law. In *Schip v. Pabst Brewing Co.*, 64 Minn. 22, a servant of the contractor sued the owner for injuries. He offered to prove that the contractor was incompetent and known to be so by the owner, also that the building being removed was in a dangerous condition. These offers were rejected by the trial court. On appeal, the Supreme Court says: "For the purposes of the case we will assume that plaintiff could have proved these offers, and was entitled to do so, if it would result in proving a cause of action against defendant. Counsel for appellant have cited no case which has held the owner liable to the servant of the contractor under such circumstances. There are many cases which hold that the owner of premises cannot, by employing a contractor, relieve himself from the continuing duty which he owes to the public and to the adjoining owners not to maintain a nuisance on his premises, or license any one else to do so. But we can find no case which holds that the owner owes any such continuing duty to the servant of the independent contractor engaged in the very work of abating the nuisance." See also latter paragraph of citation from *Foster v. City of Chicago*, *supra*, where it was held that the servant of the contractor could not recover from the owner.

In *Peoria B. & C. Trac. Co. v. O'Connor*, 149 Ill. App. 598, a laborer employed by the contractor for a street railway company sued the railway company for injuries received on account of a defective derrick rope used in hoisting an iron pole in the street. The court, after stating the rule that protects persons using the streets, said: "If appellee had been injured while using such public street or ground as a passer-by thereon, appellant could not have relieved itself of liability for its negligence in creating such condition merely because the construction company had failed to do its duty. Appellee when injured was not in the

exercise of his right as a citizen to use the public street. There was no causal connection between the negligence and the accident, and the particular place where the same occurred. We are therefore of opinion that the rule in question is inapplicable in the present case." To the same effect, see *Louisville & N. R. R. Co. v. Smith's Adm'r*, 134 Ky. l. c. 60, where, under similar circumstances, the court said: "Of course, a different question would be presented if by reason of the prosecution of this work a train had been derailed, and a passenger injured; for in such case the duty of the company to furnish the passenger with safe passage is such that it could not excuse itself for any negligent act on the part of an independent contractor that in anywise impaired the safety of its track, but no such question as that is presented here. No such relation existed between deceased and the railroad company. The railroad company was under no duty to deceased, since the relation of master and servant did not exist between them. The duty which it owed to the traveling public to maintain its track in a safe condition for the passage of its trains did not in the least obligate it to look out for the safety of deceased, who was an employee of an independent contractor engaged in a separate and distinct undertaking." Like rulings are found in *Reilly v. Railroad*, 122 Ia. 525; *Engler v. Seattle*, 40 Wash. 72; *Hanna v. Railroad*, 88 Tenn. 310. The cases of *Covington Bridge Co. v. Steinbrock*, 61 Oh. St. 215, and *Wetherbee v. Partridge*, 175 Mass. 185, on which plaintiff strongly relies, are not in point, as they involve injuries to outsiders or adjacent property. These and other cases hold to the doctrine of *Dillon v. Hunt*, 105 Mo. 161. *Scott v. Springfield*, 81 Mo. App. 312, held the city liable for injuries to a servant of the contractor, but on the ground that the city retained the actual control, and that, hence, the contractor was not independent. And so it is with other cases hold-

ing the employer liable. These cases are not in point, in view of the construction which we have given above to the contract under consideration.

From the foregoing reasoning and authorities, it is clear that, even conceding that blasting is intrinsically dangerous, there would be no liability in this case, as a matter of law, on the part of the city to plaintiff for injuries caused by the negligence of the contractor's foreman.

III. It is claimed that the petition avers that the contractor was incompetent, and known to the city to be so. The charge in the petition falls short of this. Here it is: "That said Robert J. Boyd Paving and Construction Company was at the time of entering into said contract and still is a corporation, organized and existing under the laws of Missouri. That it was an insolvent and irresponsible corporation, and was not a fit, proper or suitable corporation for the city to enter into said contract with, and that defendant city was negligent and careless in entering into said contract with said Robert J. Boyd Paving and Construction Company, in that said company was an insolvent, irresponsible company, and not a fit, proper or suitable corporation for said work, and that the defendant city at the time of entering into said contract, and throughout the performance of said work, had knowledge of the foregoing facts, or by the exercise of ordinary care would have had knowledge thereof."

The unfitness alleged must be referred to the alleged insolvency. Furthermore, for reasons given above, a charge of incompetency would not help plaintiff. The city owes no duty to the servant of the contractor to provide him a competent and skilful employer. In *Schip v. Pabst Brewing Co.*, supra, the court (l. c. 25) said: "Neither has our attention been called to any case where the owner was held liable on

the sole ground of failing to exercise with due care a temporary duty of employing a competent contractor (after which his responsibility would cease), but in every case there was a continuing duty not to maintain a nuisance on his premises himself, or license others to do so. It is often laid down as one of the conditions required to relieve the owner from liability that he shall employ a competent contractor. But this language (where it is not mere dictum) is always used in cases where the owner owes such continuing duty, and the work to be performed by the contractor will necessarily result in a nuisance to the public or the adjoining owner, unless great or extraordinary care is taken to prevent it from doing so."

The following cases are cited by plaintiff on this point: *Brannock v. Elmore*, 114 Mo. 55; *Dillon v. Hunt*, 82 Mo. 155; *Mullich v. Brocker*, 119 Mo. App. 332. But these cases refer to the obligation which the owner owes to outsiders. No case has been cited, or found by us after extensive research, which extends this obligation to a servant of the independent contractor.

IV. The pleader attempts to predicate liability against the city because of the alleged violation of section 883 of the ordinance, requiring a license to qualify one to do blasting. On this point it is sufficient to say that the law is settled in this State that a city is not liable for failure to enforce its ordinances. [*Ryan v. Kansas City*, 232 Mo. 471; *Loth v. Theatre Co.*, 197 Mo. 328.]

Tested by the foregoing reasons and authorities, the petition fails to state a case against the defendant city.

The demurrer having properly been sustained, the judgment of the circuit court is affirmed.

Lamm, Woodson and Graves, JJ., concur; *Valiant, C. J.*, *Kennish and Brown, JJ.*, dissent in opinion filed.

DISSENTING OPINION.

BOND, C.—Plaintiff sues Kansas City (a municipal corporation) and the Robert J. Boyd Paving & Construction Company (a business corporation) to recover for personal damages sustained by the belated explosion of a stick of dynamite, employed in blasting rock to make a course for a sewer in process of construction under a contract between the defendants.

The gist of the allegations of plaintiff's petition is, to-wit: That the defendant city exists and is governed under a special charter, whereby it is empowered to enact ordinances for causing and regulating sewer construction, in pursuance of which it has employed a large number of sewer inspectors; that it is required by its ordinance to employ, and has employed, a city engineer, skilled in the science of engineering, and assistants; that its engineering department supervises the construction of public and district sewers; that its city engineer is required to prepare plans, specifications and estimates of the costs of all public work, and report all violations of any contract for the doing of such work, and to superintend the execution thereof; that no person is allowed to do any blasting within said city without first obtaining from the city engineer a permit therefor, issuable only on the condition that he is satisfied that the applicant is "in every particular a safe, careful and suitable person to use and an expert in the use of all explosives used in blasting," and has entered into a bond, conditioned that such person will carefully and prudently use such explosive; that said city passed an ordinance for the construction of a "district sewer in sewer district No. 144, approved March 29, 1901," and entered into a contract with its codefendant for constructing a sewer in said district; that said contract, among

other things, provided that the work done thereunder should be "in conformity with the plans of such work on file in the office of the city engineer in Kansas City, and in strict obedience to the directions which may, from time to time, be given by said city engineer or his authorized agents, and also in accordance with the following specifications: The contractor shall not blast any rock or allow the same to be done on this work without taking such precautions by covering or otherwise as shall prevent damage or injury to person or property;" that in pursuance of the aforesaid contract, the defendants and each of them employed a gang of men, of which plaintiff was a member, who were under the immediate superintendence, direction and control of a foreman, "who was a vice-principal of defendants, with power to direct them in the performance of their duties;" that plaintiff was a member of a gang of drillers under said foreman, and that it was the duty of the plaintiff and the members of his gang by the use of steel drills, about six feet and four inches long and having bits one and one quarter inches in diameter, to drill holes in the rock through which said sewer was to be constructed, and "that the drilling of said holes under the direction of said foreman was the sole duty of the plaintiff and the members of the drilling gang;" that the work performed by them consisted of drilling "a series of holes about two and one-half deep and about two feet apart," after which the said foreman and powder man (under his immediate direction and control) "would load said holes with giant powder or dynamite, putting about two and one-half sticks of said explosive in each hole, then putting on the cap and fuse for each hole, then tamp each hole full with sand and dirt, and leaving the fuses extending out of each hole, and then said foreman would light said fuses and shoot said series of holes;" that it was usual and customary to count the number of said holes before

exploding them, and then to keep count of the number of explosions as they took place so that it could be known whether any had failed to occur; that the count of the noises of the respective explosions was then verified by an examination of the respective holes which had been loaded with dynamite; that the plaintiff and the members of his gang had nothing to do with the loading and exploding of said holes, nor of the subsequent examinations of the place, nor with the cleaning out of unexploded powder; that these duties were performed by said foreman and said powder man, who were required, after finding from examination that it was safe so to do, to employ a different gang of men to clean up the broken rock caused by said series of explosions; after that was done, "the plaintiff and his gang of drillers would be ordered to drill another series, and this process would be repeated until the excavation was made as deep as desired." The petition then alleges, to-wit: That on the afternoon of July 13, 1901, a series of holes which had been drilled by the plaintiff and his gang of drillers was attempted to be exploded by said foreman (Kelleher) and said powder man (Moriarity); that said July 13 was Saturday, and no work was done in said sewer on the Sunday following; that Saturday and Monday the broken rock caused by the explosion of Saturday was cleaned up by the other set of men under said foreman (Kelleher), with which other set of men plaintiff had nothing to do; that by reason of the negligence and carelessness of the defendants, through said foreman (Kelleher) and said powder man (Moriarity), one of the loaded holes in said series of holes, which said foreman and said powder man had not caused to explode on Saturday, was left filled with dynamite; that the existence of said loaded and unexploded hole was unknown to plaintiff and the gang of drillers with whom plaintiff was working; that the existence of said

unexploded hole and the danger thereof to the plaintiff was known to defendants, or would have been known to them and each of them by the exercise of ordinary care on their part prior to the time of the injury to the plaintiff herein alleged; that on Monday, the 15th day of July, 1901, the defendant contractor and the defendant city, through their foreman (Kelleher) negligently ordered plaintiff and his gang of drillers to go back to the place where said series of holes had been attempted to be exploded on the Saturday previous for the purpose of drilling another series of holes at said place; that in pursuance of said negligent order, said plaintiff and the other drillers in his said gang of drillers went back to said place for the purpose of drilling a new series of holes; and that while one of said gang of drillers was at work drilling a hole near the place where plaintiff was also drilling, his work caused the dynamite which had been negligently left in one of the holes since the Saturday previous to be exploded with great force and violence and to the injury of plaintiff in the following manner: "The total and permanent loss of the sight of both of his eyes, great injury to body, his private parts, his chest, face, forehead, a broken jaw, causing long illness and suffering and mental anguish, and the permanent inability thereafter to do any work, so that he has become an object of charity and an inmate of the poor farm." The petition then adds "that at the time said other driller was at work near the plaintiff neither he nor the plaintiff had any knowledge or warning whatsoever of the existence of said unexploded shot or charge at said place; that said unexploded shot or charge constituted a latent danger in plaintiff's said place of work, and that said latent danger was known, or would have been known by reasonable care, to the defendants and each of them, as well as to their said powder man and their said foreman, and to the inspectors of the defendant city, who were present on

said work throughout the construction of said sewer, superintending said work and giving orders to the foreman and men at work thereon, in time to have enabled said defendants and their said foreman, powder man and inspectors to have removed said unexploded dynamite and to have warned the plaintiff of the existence thereof; that the defendants and their foreman, powder man and inspectors negligently and carelessly failed to remove said danger and negligently and carelessly failed to warn the plaintiff of the existence thereof. But through their foreman negligently and carelessly ordered said plaintiff and his gang of drillers to go to said place and drill a new series of holes at said place where said unexploded charge of dynamite, a highly explosive powder, had been left. The petition charges that said foreman (Michael Kelleher) and said powder man (Maurice Moriarity) "*were not safe, careful or suitable persons to use said explosive, and were neither of them experts in the use of said explosive;*" that neither of them "*were competent persons for said work of blasting, and that the defendants and each of them were negligent in entrusting said work to said foreman and said powder man,*" whose incompetency and lack of expertness in the use of said explosive were known to each of the defendants; that the defendants and each of them negligently failed to select and employ on said sewer construction a blaster who was qualified for the work under the provisions of ordinance No. 883, requiring all such persons to make proof of competency and procure a licence before doing any blasting within said city, which ordinance and every other ordinance pertaining to the work of constructing the sewer, the contract expressly stipulated should be complied with in the doing and progress of the work; that this covenant of the contract was negligently violated by both the defendants; that the work in respect to which said carelessness occurred and which caused

plaintiff's injury was the work of blasting with giant powder or dynamite; that both defendants knew the necessity of said blasting and the necessity to use that dangerous explosive in removing the 2450 cubic yards of rock excavation provided for in their contract; that both defendants knew the incompetency and unfitness of their said foreman and powder man, by reason of which the unexploded stick of dynamite was left in the rock at the place where plaintiff was negligently ordered by them to drill a new series of holes, without any warning or knowledge whatsoever of the proximity of his work to the unexploded stick of dynamite. The petition then specifically charges that the defendants knew that said powder man "by reason of his age and infirmities and general deficiencies was utterly incompetent to be the powder man on said job;" that through the negligence of this incompetent powder man and incompetent foreman the missed shot of dynamite was not discovered and removed, and plaintiff was ordered to work at a place dangerously near thereto without any knowledge or information whatever of the existence of his peril. The petition also charges that the codefendant of the city was an insolvent corporation, "and was not a fit, proper or suitable corporation for the city to enter into said contract with," and that the city was negligent in making said contract, for it knew, or by reasonable care could have known, these facts; that neither the construction company nor its foreman nor blaster had any license or permit, as required by the city ordinance, to do blasting on said work, and that the defendant city and its codefendant negligently and carelessly violated their contract requiring that such license should be procured before the work was done.

The contract set out in the petition empowered the engineer to direct the "mode" of doing the work, and provided that if any person "refused or neglected" to obey his instructions, or appeared to him

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to be incompetent, that such person should "be at once discharged;" that the engineer should have power to annul the contract for good cause, and his decision should be conclusive of the existence of such cause on all litigation between the parties and should preclude any damages therefor.

The petition also pleaded that the legal effect of the contract vested the defendant city with full control and direction as to the manner of doing the work, the materials to be used, and the result to be accomplished in its entire performance.

To this petition, the defendant city interposed a general demurrer, which was sustained. Plaintiff voluntarily dismissed as to the defendant Construction Company, and appealed from the order sustaining the demurrer and dismissing his petition.

I. In considering this appeal it must be constantly borne in mind that Kansas City is a municipal corporation, and, as such, possesses a double capacity—the one public or governmental, the other private or contracting; that in the exercise of its first function it can incur no civil liability to any person; that in the exercise of its second faculty it is suable by any aggrieved person, and is subject to the same control which the courts exert over all persons; that in the work of constructing sewers, whether directly or by letting to contract, Kansas City acts only within its business powers; and for its contracts and torts in the prosecution of that work is open to suit in the same manner and to the same extent as a private person doing or causing to be done the same work. [Donahoe v. Kansas City, 136 Mo. 665; Dolan v. Laclede Gas Light Co., 145 Mo. 550; Ely v. City of St. Louis, 181 Mo. 723; State ex rel. v. Gates, 190 Mo. l. c. 550; Barree v. Cape Girardeau, 197 Mo. l. c. 389; Broad-

well v. City of Kansas, 75 Mo. 213; Werth v. City of Springfield, 78 Mo. 107; Wegmann v. City of Jefferson, 61 Mo. 55; Thurston v. City of St. Joseph, 51 Mo. 510.] That the defendant city, like every municipal corporation, is under a primal duty, which it cannot delegate, to keep its streets and sidewalks in a condition of reasonable safety, for the use of persons acting with ordinary care. [Ryan v. Kansas City, 232 Mo. 471; Russell v. Columbia, 74 Mo. 480; Welsh v. St. Louis, 73 Mo. 71.]

II. Plaintiff's petition must be reviewed under the rule prescribed for that purpose by statute, to-wit: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." [R. S. 1909, sec. 1831.] Now, the petition in this case is met by a general demurrer only. This form of attack does not reach any indefiniteness or imperfection of statement less than a total omission of all allegations from which any cause of action may be fairly implied or inferred. [Rodgers v. Fire Ins. Co., 186 Mo. l. c. 255-6; Eads v. Gains, 58 Mo. App. l. c. 594; State ex rel. v. Carroll, 63 Mo. 156; Marie v. Garrison, 83 N. Y. 14-23.] •

The only defense urged by the defendant in this case is that the allegations of the petition demonstrate that the contract between it and the contracting company created the relation of owner or proprietor and independent contractor; and, hence, that it is not responsible in damages either to the public at large or the servants of the contractor for any injury caused by the wrongful or negligent conduct of the contractor or its representatives in the performance of the work. In order to maintain this defense, the defendant city must show from the allegations of the petition that relation was *legally* created. There are cases in which it is held that the owner or proprietor may be

sued by his own servants for the tortious acts and negligences of the independent contractor or his representatives. [Herdler v. Buck's Stove & Range Co., 136 Mo. l. c. 16; Burnes v. Railroad, 129 Mo. l. c. 56; Leslie v. Coal Mining Co., 110 Mo. 31; Sackewitz v. Am. Biscuit Mfg. Co., 78 Mo. App. l. c. 153; Bartley v. Trorlicht, 49 Mo. App. 231-2-3; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642; The Magdaline, 91 Fed. 798; Chicago & Alton R. R. Co. v. Eaton, 194 Ill. 441.] As the plaintiff in this case was not ostensibly the servant of the city, his right to recover, like that of any innocent passer-by, who might have been injured in the same way, must depend upon the *legal* relationship of the city and the contracting company, as it is disclosed by the facts stated in the petition.

This reduces the matter to a single issue of law, based upon the fair legal intendment of the facts pleaded. Does the transaction between the parties show as a necessary legal conclusion that the Construction Company became an independent contractor, as that status is defined by law?

If one person is set to work upon the property of another, he must act in one of two capacities: first, as the servant or agent of the owner, who is therefore responsible for his acts in the course of his employment; or, second, as an independent contractor, by virtue of a contract *sufficient in law* to create that relation, in which case his torts and negligences cannot be imputed to the owner by his servant or the public. There is no middle position which can be occupied by one person who is in possession and at work on the property of another by the owner's consent or permission. He must be there either on behalf of the owner or on his own behalf under a valid contract to that effect. For he could only be on the premises otherwise by a trespass, and that is neither claimed nor could it be claimed under the case made in this petition. Now, the law has distinctly and positively

adjudged the elements necessary to the formation of a contract whereby one becomes an independent workman on the property of another. It follows that any agreement with the owner which lacks any element necessary to make the workman an independent contractor, leaves him occupying the only other condition which has been shown to remain, that of representative, agent or servant of the owner. The legal formula of a contract adequate to create the relation of independent contractor between a workman and the owner of the property has been crystallized into certain and positive requirements which have been again and again quoted in exact language and adopted by the appellate courts of this State in an unvarying current of authority. It is thus expressed: "The general rule is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with dangers to others, according to the contractor's own methods and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractor, or his servants, committed in the prosecution of such work. An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." [2 Thompson on Negligence, p. 899, sec. 22; Gayle v. Missouri Car & Foundry Co., 177 Mo. l. c. 446; Fink v. Missouri Furnace Co., 82 Mo. 276; Hilsdorf v. St. Louis, 45 Mo. 98; Young v. Moon, 107 Mo. 334; Crenshaw v. Ullman, 113 Mo. l. c. 639; Lancaster v. Insurance Co., 92 Mo. 460; Dillon v. Hunt, 82 Mo. 150; Loth v. Columbia Theatre Co., 197 Mo. l. c. 354; Mullich v. Bocker, 119 Mo. App. l. c. 337; Wharton on Negligence, sec. 181; Brannock v. Elmore, 114 Mo. l. c. 62; McGrath v. St. Louis, 215 Mo. l. c. 209.]

To obtain the shield of an independent contractor, the owner or proprietor must, first, select "*a competent and fit person*," engaged in an independent calling; second, the work committed to him must be neither "*attended with danger to others*" nor unlawful; third, the contractor must be allowed to do the work according to his own methods and only subject to control by the owner "*as to the results of his work*." Without the concurrence of each and all of these conditions, the condition of independent contractor cannot legally exist. The decisions in this State have not only affirmed this doctrine by the adoption of the foregoing definition, but they have held, on the various occasions when it became necessary to consider the effect of the absence of any one of these legal requirements, that the relationship of owner and independent contractor was thereby prevented, and that the owner was left responsible just as if he did the work on his own behalf. As far as necessary we will cite these instances *seriatim*.

First. As to the necessity of contracting with "*a competent and fit person*." The case was this: The defendant was excavating his lot for the purpose of erecting a house thereon. The excavators were independent contractors. Plaintiff was injured by a fragment of rock thrown into the air by the blasting made by the excavators contrary to the safeguards of a city ordinance. The court held that the ordinance in question was a wise and valid regulation and made for the protection of persons and property from injury, and had it been observed the injury to plaintiff "*would not probably have occurred*;" that the evidence showed that the owner was acquainted with the careless methods of blasting adopted by the contractors, and that this would entitle the plaintiff to recover. Adding, "*An employer cannot relieve himself from liability by giving the contract to one who is known to be incompetent or negligent*," citing cases.

[Brannock v. Elmore, 114 Mo. l. c. 62.] Again, plaintiff's two year old child fell into a vault left uncovered by an independent contractor in construction work on the owner's premises. The court held under these facts that there could be no recovery solely for the following reasons: "It is not alleged and there is no evidence tending to prove that the contractor was not a competent person to do the work. The work was not in itself of a dangerous character, did not necessarily create a nuisance, nor involve a trespass upon the property of others, and the defendant did not interfere in the direction of its performance. In such case the defendant (the owner) cannot be held liable for the negligence of the contractor, and the action of the court might well be sustained on this ground." [Wiese v. Remme, 140 Mo. l. c. 298-299.] In a recent case, speaking of the effect of failure on the part of the owner to select a fit and competent person, this court, after showing that the work complained of was *not* dangerous but was caused by the mere "negligence" of an independent contractor or his servants in the execution of it, added: "In the latter case the contractor alone is liable unless the owner is in default in employing an unskilful or improper person as contractor." [McGrath v. St. Louis, 215 Mo. l. c. 209.] The court accordingly held in that case that, there being nothing dangerous in the character of the work to render the owner liable and the injury having been caused by the mere negligence of a *competent* and *fit* contractor, the defendant city was not liable to the plaintiff for damages so received. This question was also ruled in the St. Louis Court of Appeals. There the injury complained of resulted from damage to plaintiff's property from being run into by a horse which had been delivered by the defendant for the purpose of having it broken to harness. The question arose, whether the party undertaking to do this was an independent contractor. Af-

ter defining what was necessary to constitute him as such and adverting to the evidence tending to show that he lacked competency for that employment, the court said: "But a proprietor will not be exonerated from liability for negligence in the doing of work which he lets out to an independent contractor unless he used care to select a competent person as contractor—one who not only had an occupation, but reasonable skill in performing the tasks pertaining to it. If a person entrusts the performance of work, of a kind likely to result in harm to third persons unless cautiously and skilfully done, to a manifestly unfit person, as an independent contractor, the employer will be responsible for the consequences of such contractor's incompetency. Breaking horses to harness is not necessarily dangerous to others, if properly done; and in selecting a contractor to do work of that character, a proprietor need only use ordinary care to choose a competent person. But if he is careless in selecting, he remains liable. [Citing cases.] It follows that if Bocker carelessly selected an incompetent person to break the horse, he was liable for an injury resulting from his contractor's negligence." [Mullich v. Bocker, 119 Mo. App. l. c. 339.]

The basic idea of this principle is, that a person exercising a special calling must possess reasonable skill and qualification for that work, without which he is not in reality a contractor, builder, architect or manufacturer, as the case may be; and that the owner, having knowledge of such deficiency, cannot supply it by mere agreement and thereby *make* him in law what he is *not in fact*. The effect of these decisions is in strict accord with the foregoing definition which they apply as the test of the status of an independent contractor. Hence, where the contract of the owner fails on account of the known incompetency of the ostensible independent contractor to create that relation with him, the contractor is thenceforward only to be re-

garded in law as acting on behalf of the owner; and the owner's responsibility is then measured by the settled rules of master and servant. This has been distinctly ruled in each of the four cases last cited so far as the general public can be affected. Why does not the same principle apply when an action is brought against the owner by an employee of such ostensible contractor, and when it is shown that the injury occurred solely by reason of his inefficiency and incompetency, and that these were known to the owner at the time he attempted to employ the contractor? There can be no distinction in the right to recovery of such servant and a member of the general public, if, as has been shown, such a contract between the owner and contractor was legally insufficient to serve its purpose and therefore left the parties in the only other possible relation, to-wit, that of owner or proprietor who has put another, whose incompetency he knows, to the doing of constructive or other work on his property. The reason given for an attempted distinction is, that the owner has no contractual relations with the employees of the workman. The answer is, that the owner has no contractual relations with the general public, and yet his liability to one of them for an injury resulting from the employment of an incompetent contractor is unquestioned under the decisions in this State. It must follow that no distinction can exist in the two cases founded on the want of contractual relations. And that it cannot be scientifically held that redress may be had by one which is not obtainable by the other, unless some *other* distinction can be found in the cases. The truth is, that, if the existence of contractual relations is at all necessary, then in law and in fact the servant of a contractor who has been employed with actual knowledge of his incompetency, is in contractual relations with the owner, because the effect in law of an employment so made is to make the contractor the mere representative of the

owner. This is a greater reason why such servant should not be shut off from a recovery which is open to a member of the general public having no contractual relations with the owner either in fact or in law. If a higher right exists in either case, it attaches to the position of servant of the pseudo-contractor, for the owner or proprietor *knew* when he employed him of his unskilfulness and incompetency, and knew that he must bring to his work ordinary laborers, like the plaintiff, who would probably suffer injury by reason of his want of skill and capacity, and that such would be the direct result of the contract made by the owner. With such knowledge and so contracting, the owner can, in reason, possess no greater defense when sued by the servant of the alleged contractor than if sued by a member of the general public, injured in the same way. Suppose, when this injury occurred, a lounge on the streets of the city had been struck by the *same* explosion which injured the plaintiff. As to such passer-by the liability of the defendant city is settled by the foregoing decisions in this State, under the averments of the petition that such injury was caused by the incompetency of the man in charge of the work, which was known to the city at the time he was employed. Can the plaintiff be in a worse position than that of the street lounge? Plaintiff was employed to do manual labor, and while pursuing that calling and with no knowledge, thought or warning of the danger which impended from the interposition between him and the city of an *incompetent* contractor, was his situation less protectable by the law than that of the vagrant injured at the same time, place and manner? It is submitted this statement of these concrete facts to which the position assumed on behalf of the city leads, necessarily proves that it cannot be maintained with any regard to logic and principle or to justice and harmony in the administration of the law. The rule that an owner is disabled by law from making

an incompetent person his independent contractor by merely agreeing so to do, with knowledge of his incompetency, is clearly and explicitly held in all the courts of Missouri. But it is said there is a different ruling in a case cited from Minnesota. [Schip v. Pabst Brewing Co., 64 Minn. 22.] As to this case, the learned annotator of the Lawyers' Reports, after citing it, adds: "But the weight of authority is opposed to the restricted doctrine thus enounced." He states further, that it is contradicted by numerous decisions elsewhere which exempt an employer from liability only who has used reasonable diligence to select a "competent contractor." [Citing cases.] And adds conclusively, to-wit: "The doctrine that the employment of an incompetent contractor is culpable negligence which raises a cause of action in favor of any one who is injured by conditions or occurrences which would not have existed or happened if the contractor had been competent, is also sustained by categorical statements and explicit decisions." [Citing the Missouri cases and numerous decisions of other States; 66 L. R. A. 942, and notes by the Annotator.] It can hardly be that the courts of Missouri should be asked to overturn the settled rule announced in its own decisions in favor of the irrational doctrine and unsupported view of the Minnesota court. We, therefore, rule that the petition in this case did state a *prima facie* cause of action for injuries suffered by the plaintiff in consequence of the negligence of the incompetent corporation, acting in the role of independent contractor, and in consequence of the negligence, unfitness and want of qualification of its foreman (Kelleher) and its blaster (Moriarity); all of which was known to the defendant city when it made the contract for letting the work and during the prosecution thereof, as is shown by the statements in plaintiff's petition, which are to be taken as true in reviewing the rulings sustaining the general demurrer.

III. The next essential comprised in the above quoted definition is, to-wit, that the owner cannot delegate his responsibility for ordinary care on the part of the contractor employed to perform work which is "*attended with danger to others.*" The violation of this requirement of the law has been repeatedly presented and adjudged in the decisions in this State, and it has been settled that such responsibility on the part of the owner is non-delegable, and no case has been presented in this State wherein he was permitted to divest himself of that duty by letting the work to another person. In one of the earliest cases an employee of the contractor engaged in altering a building was injured by the falling of a wall. He sued the owner of the property, who made two defenses: First, a denial of negligence; and, second, a plea that the entire work was done by contractors in accordance with plans of an architect and that the injury sued for arose thereafter "from the carelessness of contractors," etc. Under this plea defendant's evidence tended to show that a carpenter working for the contractor negligently removed a prop, causing the wall to fall upon the plaintiff. As to this defense and the evidence tending to sustain it, the court conceded that the accident happened *after* the turning over of the premises to the contractor, and said: "But if the defendant's plans of rebuilding, as recommended by his architect, required the use of materials and structures that were unsafe, his responsibility, for any injury accruing by reason of such plans, was not transferred to the contractors." Adding: "There can be no question of the liability of defendant, if the damage resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building." The verdict and recovery by the plaintiff were affirmed. [Horner, Adm'r, v. Nicholson, 56 Mo. l. c. 222, 235.] The same principle was held to entitle an adjoining proprietor to recover of the

owner of a building for injuries caused by its being negligently pulled down by an independent contractor. The court saying: "It is immaterial in such case whether the work be done by the proprietor or by an independent contractor." [Dillon v. Hunt, 105 Mo. l. c. 161.]

Again, the right of an adjoining proprietor, for damages to her property caused by the excavating work of an independent contractor engaged in the service of another, was held to exist against the owner who employed the contractor, if the petition had stated that the work was in its nature dangerous to the property of others, the court saying: "In cases of this character it seems that the principal is liable for any injury that is occasioned by reason thereof, notwithstanding the relation of *respondeat superior* may not exist, and the party doing the work is an independent contractor." [Crenshaw v. Ullman, 113 Mo. l. c. 640, citing Thompson on Negligence, sec. 24, p. 901.]

Again, the job of lowering signs had been let to an independent contractor. A passer-by was injured. The owner and not the contractor was sued. The court held that a recovery could be had, adding: "But the injury in the case at bar resulted directly from the acts called for and made necessary by the contract, that is, the changing and replacing of the sign, and not from acts which were merely collateral to the contract; and if by the negligence and carelessness of the men handling the sign it fell upon and injured plaintiff, the company is liable as if it had directly performed such acts." [Loth v. Columbia Theatre Co., 197 Mo. l. c. 354, citing Bridge Co. v. Steinbrock, 61 Ohio St. 215; Deming v. Railroad, 169 N. Y. 1; Inhabitants of Lowell v. Railroad, 40 Mass. 24; 16 Am. & Eng. Ency. Law (2 Ed.), 196.]

It is not claimed that these decisions do not settle the principle that an owner cannot shift to another his duty to see that "work attended with danger," if

done on his property, shall be performed without negligence; but it is urged, first, that this rule cannot be invoked by an employee or servant of the contractor; and, second, that the blasting contracted for in this case, was not work attended with danger to others. This first objection is completely within the reasoning whereby it was shown above, that the contention that an owner might be liable to the public, but not to the servants of the contractor, for injuries caused by the owner's employment of a person known to be unfit and incompetent to perform the work, is without any support either in reason or authority. All that was then said applies with equal conclusiveness to the renewal of that objection at the present time. No valid reason can be given why such a distinction should be made. The legal principle upon which the liability of the owner depends is, that he shall not *directly* nor *indirectly* put his property to such use as probably to injure others, without at the same time assuming responsibility for such injuries in so far as they are caused by his own negligence or the negligence of his substitute in the work. This creates a non-delegable duty, as to which it has been said with conclusive logic, "It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation. If it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute." [2 Labatt on Master and Servant, sec. 559.]

We have been totally unable to find any precedent which announces a logically tenable ground for the doctrine that the owner, resting under a personal duty cast upon him by law as an essential incident to his ownership of property, may commit a breach of that duty without incurring liability to any person thereby injured, whether his own servant or the servant of one who (as contractor with the owner for doing that duty) negligently fails in its performance, or to a

stranger. The duty being an imperative one and put upon the owner by law, he must perform it himself with due care or answer for due care on the part of any other person to whom he may transfer its performance. For this reason he cannot *make* the transferee of that duty an independent contractor under settled principles of law. This incapacity of the owner is explicitly noted in the words of the definition of that relation quoted above and uniformly adhered to in this State.

The next objection is as to character of the work. Was this work "attended with danger to others?" In the cases illustrative of dangerous work, above cited, we find that it was held to apply to turning over to an independent contractor the task of remodeling a building. The danger in that case grew out of the falling of an existing wall, caused by the pulling away of a prop by one of the servants of the contractor, to the injury of another. In the next case the danger arose to adjoining property from excavating work necessary to the erection of a building, done by an independent contractor. In the third case, the danger ensued from the work of lowering a sign attached to a projecting beam in front of the Columbia theatre. In each of these cases it was expressly adjudicated that the given work was "attended with danger to others." In the case at bar the contract called for blasting by dynamite a mile and a third (2450 yards) of solid rock. Is it conceivable that this work was less dangerous than the three former instances in which it was so held? Is it not clear that the destructive natural force called into play by igniting sticks of dynamite inserted into bodies of solid rock is infinitely more dangerous than remodeling a standing wall, or excavating a cellar, or lowering a sign? No possible misapprehension existed in the minds of the city authorities, for they passed a law that this particular work (blasting) should not be done within the limits

of the city without a thorough ascertainment of the skilfulness and competence of the person doing the same, and without a license thereafter so issued to him, based on that finding. This clearly shows that the city knew the peril likely to ensue from such work, and adopted a valid safeguard to prevent injuries therefrom. It is apparent the city not only had knowledge of the true character of the work in question but provided a safeguard (which it did not comply with) for minimizing the danger. This knowledge possessed by the city of the dangerous character of the work is one which is also within the judicial knowledge of the courts. In the case of *FitzSimons & Connell Co. v. Braun & Fitts*, 199 Ill. l. c. 394, it is said: "The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice." This was affirmed in the case of *City of Chicago v. Murdock*, 212 Ill. l. c. 12, where it was also held that the city could not divest itself of the character of principal by letting a contract of that sort for the making of a public improvement within its limits, and that it was liable for damages caused by the negligence of the contractor on the doctrine of *respondeat superior*. [Ibid., 13.] Again, the Supreme Court of Connecticut, after an exhaustive examination of the authorities and in conformity with the text of Cooley on Torts, said: "We think, also, that the operation of blasting with dynamite is 'intrinsically dangerous;' that the court should have taken judicial notice that it is so. . . . It is a sound rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies within my power, to see to the doing of that which is neces-

sary to prevent the mischief. Failure to do so would be culpable negligence on my part. [Citing an English case.] Certain of the provisions in the specifications, to which reference has been made, were apparently inserted in recognition of this principle. [This case was sewer construction.] But in such cases it is not sufficient that the employer contracts with another to use the care to prevent harm, which the hazardous nature of the stipulated work requires. He is bound, at his own peril, to see to it that such care is used. And he is responsible, as for his own negligence, if it is not." [Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 1. c. 527-528.]

We think in reason, experience, authority, and from the very terms of the contract made by the city, it is evident that the work of blasting as stipulated for was "attended with danger to others," and that this fact was known to the city at the time of the letting of the contract; and that the petition under review also states a prima facie cause of action against said city for the injury to plaintiff, caused by the negligence of the contractor or its representatives in the prosecution of the work.

This reasoning does not involve, as has been suggested, the liability of the owner to the independent contractor himself. The latter plies his particular trade for livelihood. This implies a representation on his part that he is possessed of the requisite skill and competency. When he solicits employment in his own calling, he cannot ask the employer, who knows nothing of his special craft, to indemnify him against his own lack of qualification for his own trade, or against his own negligence. Such a notion is contrary to the axioms of the law. *Volenti non fit injuria*. [Broom's Leg Maxims (5 Ed.), note p. 270.] On the other hand, the mere laborers employed by the person assuming to be a fit contractor have no skill in his particular mystery, nor are they expected to do other

than manual work. This fact is well known to all employers and the public in general. Hence the relationship of the owner to them is essentially and radically distinct from that which he bears to the master of the handicraft.

The principle we affirm is, that in turning over work "attended with danger" to a contractor, the owner assumes no liability whatever with respect to him; but does assume that the dangerous work shall be performed with ordinary care, and that this responsibility extends to the common laborers, whom the owner knows must be employed by the contractor to assist in doing the work, as well as to strangers.

The case of *Blumb v. Kansas City*, 84 Mo. 112, is in irreconcilable conflict as to its ruling with the established law in this State. In the *Blumb* case, a lady was using a street whereon a contractor with the city was engaged in blasting to construct a sewer. The evidence showed that the city engineer who superintended the work had knowledge "that the men engaged in the work were guilty of carelessness in making the blast;" that neither the city nor its engineer took any steps "to stop this careless blasting." Plaintiff recovered \$2000. It was nevertheless held that this should be reversed, and that it was not necessary under those facts for the city "to suspend or cancel the contract let." If that doctrine could be sound, then the established rule in this State, enounced in every other case in which it has come up for review, that the city is under an absolute duty to keep its streets reasonably safe, must be repudiated. This undeleable duty on the part of the city is, however, maintained in the following cases: *Ryan v. Kansas City*, 232 Mo. 471; *Benton v. St. Louis*, 217 Mo. l. c. 700 (the latter citing all the cases); *Lindsay v. Kansas City*, 195 Mo. l. c. 178. The duty in question is nowhere stated with more pith and clearness than by LAMM, P. J., in the case of *Benton v. St. Louis*, *supra*, where it is said:

"It (the city) cannot shirk that duty, or shift it over to, or halve it with, others. So much is the clear law in Missouri." In the light of this settled rule in this State, the Blumb case is illy considered, and on this point should be overruled.

IV. Wholly independent of the liability of the defendant city arising from its abortive attempt by contract to make a *competent* contractor out of a corporation and its managers and representatives who it knew at the time of the contract were not such, and wholly aside from its effort to delegate to such corporation and persons its absolute duty to be responsible for the careful performance of work attended with danger, there is another distinct ground for the creation of a cause of action against the defendant city, which is positively alleged and stated in the petition in this case. It is this. The petition alleges that the city contracting through its engineer with the Construction Company stipulated and covenanted that each and all of its ordinances applicable to the doing of the work in question should be complied with (including the ordinance regulating blasting and requiring competent and licensed persons for that duty). This obligation assumed by the city enured to the benefit of all persons who would be injured by its breach. The defendant city, according to the allegations of the petition, committed an intentional and known breach of this contract and duty assumed by it and became liable for this neglect to any person thereby injured. This was not a case of liability arising from the failure on the part of the city to enforce a police ordinance. But the case made by the petition and the contract entered into by the city, is one for negligent breach of duty to require and prescribe safeguards to be employed in the doing of the work. That an action may be brought against the city which has let out work on its streets, for negligence, and that the ordi-

nances of the city regulating such work are *evidentiary*, in support of such action, has been distinctly and positively enounced by this court in a recent opinion with great clearness and force. According to the positive allegations of the petition under review, a cause of action is stated against the city for the negligent breach of its duty to require the work of sewer construction to be performed in strict accordance with its own ordinance safeguarding it. That ordinance and the contract requiring its precautions to be observed are set out in the petition in this case, and the charge is that the city negligently and knowingly failed to do its duty assumed by its positive agreement. Now, in speaking of the force and admissibility of such a precautionary ordinance, this court said: "The ordinances themselves do not make a *prima facie* case, but may be considered with other facts in determining the question of negligence or no negligence on the part of the city." [Ryan v. Kansas City, 232 Mo. l. c. 485.] This differentiation between a cause of action originating from mere non-enforcement of a police ordinance and a cause of action based on negligence, in support of which such an ordinance is admissible, is clear and conclusive. Under the duty assumed by its contract in this case, the city was bound to require the observance of the safeguards prescribed by it, and which it covenanted to do in the very terms of the contract itself. Its *negligence* in failing to do this is the origin of one of the causes of action in the petition. Hence the ordinance in question is admissible in evidence as tending to prove that negligence, and for the added reason that the city *contracted* that it should be obeyed in this particular instance.

For this reason we hold that the petition under review stated a cause of action entirely apart from any relationship, if such could have existed, which is denied, of employer and independent contractor on the part of the city and its codefendant.

Our conclusion is that the allegations in the petition in this case, fairly interpreted, state three causes of action: First, for negligence arising out of the employment of a contractor known to be incompetent and unskilful; second, for the negligent performance of work "attended with danger to others" by the contractor and its foreman and its blaster; third, for negligence and breach of duty on the part of the city in failing to require the observance of the safeguards against injury, which it contracted should be used

These conclusions put no obstacles whatever in the way of improvement and progress, for the defendant city has ample power and is charged with the duty under its own laws to take bonds indemnifying it against any liability arising in the manner stated in this petition.

The general demurrer in this case should be overruled, and the city required to answer or make other defense to the causes of action stated in the petition.

This cause in Division Two was assigned to *Bond, C.*, and his opinion, concurred in by *Roy, C.*, was approved by said Division. As rewritten by *Bond, C.*, since the majority opinion, it is adopted as the dissenting opinion of *Valliant, C. J.*, and *Kennish and Brown, JJ.*

HENRY E. TRENDLEY, TAYLOR R. YOUNG and
HENRY A. GAUTIER, Appellants, v. ILLINOIS
TRACTION COMPANY, EAST ST. LOUIS &
SUBURBAN RAILWAY COMPANY, ELEC-
TRIC RAILWAY EXPRESS COMPANY, J. M.
ALLEN, FREDERICK E. ALLEN, C. H.
STARKEL, J. WEINGAERTNER and P. J.
JOHNSON.

In Banc, March 1, 1912.

1. **CONTRACT: Cancellation: Unwise.** If a contract made by a corporation was made in good faith and by lawful authority it cannot be set aside by the court at the suit of the minority stockholders and minority directors on a showing that it was unwise or that it gave to the other party the advantage. Corporations, like individuals, make bad bargains, but the courts will not for that reason set their contracts aside.
2. ———: ———: **Fraud.** An express company had a contract with the Suburban Railway Company whereby the express company was granted the exclusive right to do an express business over the lines that the railway company then owned or might thereafter acquire, and that contract was at a subsequent date so modified as to relinquish the exclusive feature of the contract and to authorize the Suburban Company to make a contract with the Illinois Traction Company allowing the latter to pass its cars carrying through-express freight over certain lines of the Suburban Company. It is this modification of the original contract that is the matter in suit, and the plaintiffs, who are minority stockholders and minority directors of the express company, claim that the modification was so unfavorable to the express company as to sustain the allegation that it was the result of fraud on the part of its president and other directors entrusted with the duty of protecting the company. The Traction Company owned a large system of completed interurban electric railways coming from Springfield, Illinois, to St. Louis, and when the contract was modified was constructing a line which if completed would reach from Edwardsville to East St. Louis and carry both local and through-express freight, but it wished to cover the route by use of the Suburban tracks, without building that line. If that line were built the Traction Company would have hauled express freight, and would have been a more formidable competitor of the express company from Edwardsville to East St. Louis than it would have been if the concession to carry only

through freight over the Suburban were made, which concession the modification of the contract permitted to be made, and by that modification the express company relinquished its exclusive right to carry through-express freight between Edwardsville and East St. Louis over the Suburban, but acquired the right to run express cars between those two cities, and between Alton and East St. Louis. *Held*, that these facts show that the charge of fraud against the majority directors was unfounded.

3. ———: ———: **Reduction of Capital by Unwise Contract.**

A board of directors cannot increase or reduce the capital stock of a corporation, but that rule does not prevent the directors from modifying a contract which constitutes a large per cent of the company's assets, even though it be ninety per cent, and the modification results in great loss to the company. Nor can the board of directors, unless authorized thereto by the stockholders, put an end to the company's business and defeat the objects of its creation by selling in mass all its property and good will; but where the modification of an existing contract had no such purpose, and the evidence tends to show that if the majority of the directors had been left alone to carry on its business under the modified contract, and had not been harassed by hurtful suits brought by the minority directors and stockholders, the corporation might have entered upon a successful business career, it will not be held that the board of directors did not have authority to make the modified contract.

4. ———: ———: **Special Meeting: Specified In Notice.**

A notice specifying that the purpose of the special meeting of the board of directors would be to authorize the president to sign and enter into a certain contract "bearing date July 16, 1906," sufficiently specifies that the purpose was to execute a contract bearing that date, which after being redrafted and dated July 18th, but not otherwise changed, was then signed—especially where all the directors were present.

5. **CORPORATION: Directors: Lawful Meeting: Trapped Into Being Present.**

A director cannot be trapped into a meeting of the board against his will; and though the meeting is held on the day and at the hour fixed by the by-laws, yet if his presence is necessary to make a majority and he took no part in the meeting, it was not legal. So that where the by-laws provided for a regular meeting at ten a. m. on the first Monday of each month, at the company's office, which was rarely observed, and at that hour on a certain first Monday two of the five directors called at the office where another was in charge and stated to him that they had come to hold a directors' meeting, and he left, though counted by them as present, and no notice had been given of such meeting to either him or

Trendley v. Railroad.

the other directors and no meeting was expected, said meeting was not legal.

6. **CONTRACT: Cancellation: Equity: Forfeiture: Pleading: Decree.** Where the petition to have cancelled a modification of a contract between an express company and a railway company, states that the contract has been forfeited by the railway company and asserting that it would be inequitable to permit it to be forfeited and praying that the forfeiture and modification be annulled and that the railway company be compelled to continue to perform the original contract, to which the railway company files a general denial, a dismissal of the bill and a refusal to cancel the modified contract completely disposes of the question of forfeiture; and it was not good pleading for defendant to justify the forfeiture in its answer by way of a cross-bill, in the equity suit, but since the dismissal of the bill disposes of the question of forfeiture, that part of the decree declaring the contracts forfeited may be ignored.
7. **RECEIVERS: Distribution of Proceeds: No Objection to Order Until After Appeal.** Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiffs may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands, and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree.

Appeal from St. Louis City Circuit Court.—*Hon. M. G. Reynolds*, Judge.

AFFIRMED.

Daniel Dillon and Taylor R. Young for appellants.

(1) The contract of August 16, 1904, constituting, as it did, ninety per cent of the value of the assets of Electric Railway Express Company, and having been accepted as payment for that proportion of the capital stock of the company because of its exclusive feature,

could not be modified by the board of directors so as to eliminate this feature. In attempting to do so, the board of directors exceeded their power. *Chicago Ry. Co. v. Allerton*, 18 Wall. 233; *Pressed Brick Co. v. Schoenrich*, 65 Mo. App. 283; *Gill v. Ballis*, 72 Mo. 424; *Library Hall Co. v. Pittsburg Library*, 173 Pa. St. 30; *Hope v. Beckman*, 47 Mo. 93; *Bank v. Johnson*, 24 Me. 490; *Bedford v. Bowser*, 48 Pa. St. 29; *Olleshemer v. Mfg. Co.*, 44 Mo. App. 172; 10 Cyc., p. 758 to 770; *Kelsey v. Sargent*, 40 Hun, 150; 2 *Thompson on Corporations* (2 Ed.), sec. 1187; *Shoe Co. v. Kurtz*, 34 Mich. 89; *Cass v. Iron Co.*, 9 Fed. 640; *Venner v. Railroad*, 28 Fed. 581. This power rested in the stockholders solely. 3 *Thompson on Corporations*, sec. 3979; 1 *Elliott on Railroads*, sec. 254. (2) Even if the directors did have the power to so modify said contract, the execution of the contracts actually executed, dated July 18, 1906, August 10, 1906, and November 6, 1906, were never, prior to the institution of this suit, nor at any other time, authorized by the board of directors of the Electric Railway Company, since the minutes of the directors' meeting of July 31, 1906, are incorrect, and the officers of Electric Railway Express Company were only authorized to execute the contract read at said meeting, and which was never executed, and contains valuable features omitted in the contracts as actually executed. *Campbell v. Pope*, 96 Mo. 468. (3) But conceding this power as resting in the board of directors, and also conceding the minutes of the meeting of directors held on July 31, 1906, to be correct, yet the contracts of July 18, 1906, August 10, 1906, and November 6, 1906, were executed without authority for the following reasons: (a.) The modification of the contract of August 16, 1906, was a matter of discretion, which, if it did rest in the board of directors, and not the stockholders, could not be delegated to Mr. Allen, the president; 10 Cyc. 770; 3 *Thompson on Corporations*, sec. 3944; 1 *Elliott on Railroads*, sec. 257; *State*

ex rel. v. Perkins, 90 Mo. App. 603; Railroad v. Railroad, 51 Fed. 309; York Co. v. Ritche, 40 Me. 425. (b.) Allen, having an interest in the execution of the contract of July 18, 1906, believing, as he did, that it would pay for his stock in Electric Railway Express Company, and having actually executed that contract, the same is voidable and may be set aside at the instance of the stockholders. Engine Co. v. Charter, 47 Ill. App. 36. (c.) Prior to the execution of the said contracts of modification, a legal meeting of directors of Electric Railway Express was held on August 6, 1906, and the officers of the express company were directed not to execute said contracts of modification unless authorized so to do by a resolution of the stockholders at a duly called meeting (which was never done), and said contracts of modification were, at said director's meeting, expressly disapproved. 3 Clark & Marshall on Corporations, p. 2085 to 2087; Library Hall Co. v. Library Assn., 173 Pitt. 30; State v. Mayor, 37 Mo. 270; Buell v. Buckingham, 16 Iowa, 284; 2 Thompson on Corporations (2 Ed.), sec. 1156; Foster v. Mill Co., 92 Mo. 79; Field v. Field, 9 Wend. 394; Gas Co. v. Rushville, 6 L. R. A. 315; Stobo v. Prov. Co., 45 Ill. App. 440. No notice need be given of the holding of a directors' meeting held on the regular meeting day as provided by its by-laws. (d) No proper legal notice was given to the directors of the object and purpose of the meeting of July 31, 1906. The notice which was given amounts to nothing more than a request to meet. The nature of the contracts should have been given under the circumstances of this particular case. Hill v. Mining Co., 119 Mo. 9; St. Louis v. Withaus, 90 Mo. 646; Clark & Marshall on Corporations, p. 2082; 2 Thompson on Corporations (2 Ed.), sec. 1140, 1141; Young v. South African Syndicate, 65 L. J. Ch. 638. (e.) Even if the notice would, under ordinary circumstances, be sufficient, yet it is invalidated absolutely by the false statement of President Allen on July 27, 1906, to direc-

tor Young, who, upon receipt of said notice, inquired of President Allen the nature of the proposed contracts, and was told that since the defendant East St. Louis & Suburban Railway Company had acquired the Alton, Granite & St. Louis Traction Company and Edwardsville line he thought it advisable to perfect the express company's rights to carry express over those lines by the execution of a formal contract by East St. Louis & Suburban Railway Company to that effect. Under such circumstances, it was no notice at all to Director Young. *Johnston v. Jones*, 23 N. J. Eq. 216. (f.) Even if the notice of the purpose of holding the meeting of July 31 be sufficient and though directors had the power to surrender the exclusive feature in the contract of August 16, 1904, and also had power to delegate this authority to J. M. Allen, yet the latter had no authority to delegate the authority thus delegated to him to a board of arbitration, which he did do, consisting of counsel for the Clark interests and Messrs. Warnock, Williamson & Burroughs. *Madden v. Realty Co.*, 75 Mo. App. 358; *Mechem on Agency*, sec. 185-186-191; *Morawetz on Corporations*, sec. 536; *Neiner v. Altemeyer*, 68 Mo. App. 243. (g.) Though conceding the point raised in the last paragraph to be without merit Mr. Warnock was an incompetent arbitrator. No formal retainer is necessary to create the relation of attorney and client. *Mechem on Agency*, secs. 808, 822, 824, 798; *Atlee v. Fink*, 75 Mo. 100; *Briggs v. Withey*, 24 Mich. 136; *Goldsmith v. Wamsanz*, 86 Mo. App. 9; *Stone v. Slattery*, 71 Mo. App. 445; *Tisdale v. Tisdale*, 64 Am. Dec. 783. (h) But conceding all the foregoing points to be without merit, yet the contracts were entered into without authority, since J. M. Allen did not execute any contract which "in his judgment, would best subserve the interests of the company," for he did not exercise his judgment or discretion in determining such contract. Fred E. Allen, his brother, substituted his discretion for the

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discretion of J. M. Allen, although the former knew nothing about the contract of August 16, 1904, and for and in behalf of Electric Railway Express Company agreed upon the terms of the contract of July 18, 1906, though F. E. Allen admits he acted for the interests of his own company—the East St. Louis & Suburban Company. *Lee v. Smith*, 84 Mo. 309; *Atlee v. Fink*, 75 Mo. 100. (4) There was no consideration given defendant Electric Railway Express Company for the contract of July 18, 1906, and it should be set aside on that ground. It amounts to a fraud in this case. *Railroad v. Brown*, 43 Mo. 294; *Durfer v. Moran*, 57 Mo. 374; *Holdsworth v. Shannon*, 113 Mo. 508; *Lamp Co. v. Electric Co.*, 64 Mo. App. 115. Even if there was any consideration for the contract of July 18th, 1906, it was so grossly inadequate as to shock the conscience of a chancellor, and said contract, for that reason, should be set aside. *Holmes v. Fresh*, 9 Mo. 201; *Nelson v. Betts*, 21 Mo. App. 219. (5) But if all the points heretofore urged as a reason for setting aside the contracts of July 18, August 10 and November 6, 1906, should be without merit, yet these contracts should be set aside on the ground of the fraudulent conduct of the defendants. Even if the Illinois Traction Company was not a party to the actual fraud, it had notice of same since the contract of August 16, 1904, was a matter of record, the same having been duly recorded in the office of the recorder of deeds at Belleville, St. Clair county, Illinois, during the month of August, 1904, and notice of action of directors of Electric Railway Express Company, August 6, 1906, having been given it prior to execution of the contract giving it the right to operate over the Clark rails. 16 Cyc. 81 to 88; *Harkness v. Fraser*, 12 Fla. 341; *Atlee v. Fink*, 75 Mo. 100; *Corder v. O'Neill*, 207 Mo. 637; *Tisor v. Labaume*, 14 Mo. 198; *Doss v. Davis*, 60 Mo. 300; *Dickson v. Kempinsky*, 96 Mo. 252. (6) The court erred in overruling plaintiff's motion to set

aside its order in directing the receivers to deliver all property in their possession belonging to Electric Railway Express, and discharging the receivers, and in overruling plaintiffs' motion for an order on defendant J. M. Allen, as president of Electric Railway Express Company to turn over to said receiver the sum \$4,200 derived from the proceeds of the sale of assets belonging to Electric Railway Express Company theretofore in possession of said receivers, the plaintiffs in this case having a first lien on these assets, and on the proceeds from the sale thereof by virtue of their ownership of the receivers' certificates issued by said receivers under order of court, and on which there remained an unpaid balance of \$4,000 and interest. *Kneeland v. Luce*, 141 U. S. 491; *Alderson on Receivers*, p. 468, sec. 340. It has been held that receivers' certificates are entitled to priority of payment over the receivers' fees, and compensation for his counsel. *Bank v. Coal & Coke Co.*, 115 Fed. 878. Even though said motion was made and overruled after entry of final decree. *St. Louis v. Brooks*, 107 Mo. 380. (7) The trial court erred in enforcing the forfeiture as prayed by defendant East St. Louis & Suburban Railway Company, and in failing to relieve such forfeiture. *Moberly v. Trenton*, 181 Mo. 645; 2 Story, Eq. Jur. (13 Ed.), p. 652; *Pomeroy*, Eq. Jur. (2 Ed.), sec. 459; *Messersmith v. Messersmith*, 22 Mo. 369; *Towne v. Bowers*, 81 Mo. 491; *Sease v. Cleaveland F. Co.*, 141 Mo. 488. In *Giles v. Austin*, 62 N. Y. 486, and *Noyes v. Anderson*, 124 N. Y. 175, it is held that a forfeiture will, in equity, always be relieved where the nonpayment is a mere omission, and not an act of wilful bad faith. Time was not of the essence of contract of August 16, 1904. *Pomeroy v. Fullerton*, 113 Mo. 440. But if it was it was waived. *Esbell v. Railroad*, 56 Mo. 282.

N. S. Brown, Seddon & Holland, and Schaefer, Farmer & Kruger for respondents.

VALLIANT, C. J.—This is a suit in equity wherein the plaintiffs are the minority stockholders and the minority directors, and the individual defendants are the majority stockholders and the majority directors of the defendant corporation the Electric Railway Express Company; the other defendants are the East St. Louis and Suburban Railway Company and the Illinois Traction Company, both of which are Illinois corporations. The object of the suit is to cancel certain contracts whereby a previous contract between the East St. Louis & Suburban Railway Company and another corporation called the Electric Express Company, of date August 16, 1904, which contract had been duly assigned by the Electric Express Company to the defendant the Electric Railway Express Company, was modified or changed in certain important particulars. The ground on which the plaintiffs seek to have the contracts of which they complain set aside is that they were the result of fraud and conspiracy on the part of the individual defendants assuming to represent the Express Company on the one hand, and the East St. Louis & Suburban Railway on the other.

The East St. Louis & Suburban Railway Company at the time referred to owned and operated certain lines of railroad which extended from East St. Louis east and southeast, over which lines cars were propelled by electricity. That railroad company, August 16, 1904, entered into a contract with a corporation called the Electric Express Company, whereby the latter company, in consideration of a certain per cent of its earnings to be paid to the railroad company, was granted the exclusive right to do an express business over the lines that that railroad company then owned or might thereafter acquire, and the railroad

company was to furnish the Express Company cars for that business, and the Express Company was to furnish the railroad company an account of its earnings for each month on the 10th day of the month next following, and pay the rate per cent of its earnings agreed on to the railroad company on the 15th, and on failure to render the account and make the payment at the time specified the railroad company had the right to cancel the contract.

The petition alleges that the exclusive right to do an express business over the lines of the East St. Louis & Suburban Railroad Company (which we will hereinafter call the Suburban Company) was of great value and the chief asset of the Electric Railway Express Company which will hereinafter be called the Express Company). It is further alleged that the individual defendants as officers and directors of the Express Company "fraudulently and covinously" for their personal profit and to the injury of the Express Company, entered into "three pretended contracts" with the Suburban Company of dates respectfully July 18, August 10 and November 6, 1906, whereby the valuable right held by the Express Company under the contract of August 16, 1904, was attempted to be annulled.

At a special meeting of the board of directors of the Express Company, held July 31, 1906, defendant Allen presented to the board for its approval a paper then unsigned, dated July 16, 1906, in form of a proposed contract to be made between the Express Company and the Suburban Company, in which the Express Company was to agree, for the consideration therein expressed, to relinquish the exclusive feature of its contract of date August 16, 1904, and to authorize the Suburban Company to make a contract with the Illinois Traction Company allowing the latter to pass its cars carrying through-express freight over certain lines of the Suburban Company. A full board

was composed of five directors, but one director had resigned; the remaining four were present at that meeting; three of those present voted to approve the contract and to authorize its officers to execute it on the part of the Express Company; one director voted no on the proposition. Two days after the adjournment of the meeting, August 2, 1906, one of the directors who had voted to approve the contract and authorize its execution, notified Mr. Allen, the president of the Express Company, that he had examined the contract carefully and was then of the opinion that it was not for the best interest of the Express Company and requested that it be not executed and he also notified the officers of the Suburban Railway Company not to execute the contract. The petition also states that this director at the same time notified Mr. Allen, president of the Express Company, that he, the director, had been deceived by Mr. Allen and misled by false statements made by him into voting for the contract at the meeting, but there is no specification as to what the statements of Mr. Allen were that are alleged to be untrue, further than the general statement that he said it was for the best interest of the Express Company.

The contract of August 10, 1906, above mentioned, was an agreement between the Suburban Company, represented by its vice-president, and the Express Company, by its president, agreeing to submit the draft of the proposed contract of July 16th to their respective attorneys, to decide "whether it clearly expresses its intent," and the attorneys were to draft a new form if the one presented was not clear in its meaning, or draft a supplement thereto, interpreting any clause of uncertain meaning. Then came the above mentioned contract of November 6, 1906, drawn by those attorneys, in which it is recited that there were some uncertainties or ambiguities in the language of the draft of July 16th, and these were interpreted and

their meanings put at rest by that instrument. The two instruments, that of July 16th and November 6th, are but one contract, the latter explaining the first.

A charge is made in the petition that the attorney intrusted with the matter of interpreting the draft of the contract of July 16th on the part of the Express Company was really an attorney for the Suburban Company, but that charge went no farther in specification than asserting that he was employed by the Suburban Company to represent it in certain other matters of litigation. There is no suggestion that the draft of the contract of November 6th is an unfair exposition of the meaning of that of July 16th.

The petition charges that on August 6, 1906, that is, six days after the special meeting of the directors of July 31, 1906, at which the contract in question was approved and authorized to be executed, there was a regular meeting of the board of directors held, at which a resolution was adopted disapproving that contract and forbidding the officers to execute it unless a majority of the stockholders at a duly called meeting should approve it. It is alleged that that meeting was composed of three directors who constituted a majority of the board, to-wit, the director who had voted against the proposition to approve the contract at the meeting of July 31, 1906, and the director who had voted in favor of it at the meeting but who afterwards notified Mr. Allen, the president, that he had changed his mind; the resolution of disapproval is alleged to have been adopted by the vote of those two directors who constituted a majority of those present; the other director who is alleged to have been present, Mr. Allen, did not vote. The legality of that meeting is denied by the defendants; we will return to it herein later. The business of the Express Company was conducted under the new contract until the collapse of the company after this suit was instituted.

The Express Company failed to pay the Suburban

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Company on January 15, 1907, the amount due for cars furnished and the service rendered in the preceding month of December, as required by the original contract of August 16, 1904, and also in the new contract of July 18, 1906, and the Suburban Company on January 16th notified the Express Company that the contracts existing between the two companies were, because of such failure, forfeited, and thereafter the Suburban Company refused to furnish cars to the Express Company and its business practically ceased. On January 19, 1907, on motion of the plaintiffs herein, the court appointed receivers to take possession of the property and affairs of the Express Company and conduct its business and authorized them to borrow \$5000 to be used in the conduct of the business and issue certificates therefor. The plaintiffs loaned that amount of money to the receivers, taking receivers' certificates therefor; the receivers were ordered by the court to pay the Suburban Company \$1400, the amount due it for the month of December and for the non-payment of which the forfeiture had been declared. The receivers made the payment and the court ordered the Suburban Company to continue furnishing cars and service to the Express Company as required under the contract of August 16, 1904, until the further order of the court. The business of the Express Company was conducted by the receivers until the final judgment in the cause, when they were discharged.

The petition states that defendant Allen was a stockholder in the Suburban Company and others of the defendants were also interested in that company, and were moved in their conduct in this matter by a desire to promote the interest of the Suburban Company at the expense of the Express Company.

The answers of all the defendants are in effect general denials, except that of the Suburban Company, which in addition to the general denial states,

as by cross-bill, the failure of the Express Company to perform its part of the contract in the particular of paying for the service rendered and that in consequence thereof the Suburban Company had declared the contract forfeited, having first given notice in writing to the Express Company on December 19th that it would do so unless the payment was made on January 15th in compliance with the contract. The cross-bill prayed that the court decree the contract forfeited.

To this the plaintiffs replied that the Suburban Company had no right to declare the forfeiture when it did so, because it had never demanded strict compliance with that part of the contract as to prompt payments, but the custom had been to let the payment be made within a reasonable time after the 15th of each month, and that custom had been a practical waiver of the strict letter of the contract; the reply also stated that the alleged notice that payment would be required on January 15th was not given to the plaintiffs or the other stockholders, but to Mr. Allen, the president.

The finding of the court was in favor of the defendants on the charges of fraud made against them and on all the issues. The decree was that the order of the court requiring the defendant the Suburban Company to furnish cars to the Express Company be dissolved, and that the plaintiff's bill be dismissed. It was also ordered that the receivers should make a report to the court showing the amount of money in their hands, that out of such fund they pay the expenses of the receivership and apply the balance towards payment of the certificates issued by order of court, and turn over all the rest of the property in their hands to the defendant the Electric Railway Express Company.

From that decree the plaintiffs have prosecuted this appeal.

I. There was a great deal of evidence in the case; it covers about 700 printed pages. A very large part of it bears on the question of whether the contract of July 18, 1906, was so unfavorable to the Express Company as to sustain the charges in the petition that it was the result of fraud on the part of the individual defendants who were entrusted as directors with the duty of protecting the interests of that company. If the contract of July 18, 1906, which modified that of August 16, 1904, was made in good faith and by lawful authority it cannot be set aside by the court on a showing that it was unwise or that it gave the Suburban Company the advantage. Corporations like individuals sometimes make bad bargains, but the courts will not for that reason set their contracts aside. We do not mean to say or imply that this was a bad bargain for the Express Company, but we merely state the point of law.

On the part of the plaintiffs there was evidence tending to show that, depriving the Express Company of the exclusive feature of the contract of August 16, 1904, and authorizing the Suburban Company to make a contract with the Illinois Traction Company, allowing it to run express cars carrying through freight over the Suburban road from Edwardsville to East St. Louis, introduced a competitor in the business destructive of the rights of the Express Company. On the other hand the testimony on the part of the defendants tended to show that the Illinois Traction Company was a corporation owning a large system of already completed interurban electric railroads coming from Springfield, Illinois, towards St. Louis, and was then engaged in the construction of a line which when completed would reach from Edwardsville to East St. Louis, and that it had ample means to complete the line and when completed it could carry not only through but local express freight between those points. But the Traction Company wanted to

cover the route along the contemplated line and enter East St. Louis with through-express freight without building that line and to devote its energies to the construction of its line into the city of St. Louis over its own bridge north of East St. Louis, and this was its inducement to seek a passage for its through East St. Louis freight over the Suburban road. If the Traction Company had been forced to complete its own line into East St. Louis it could have carried not only through-express freight, but local also from Edwardsville to East St. Louis, and it would have been a more formidable competitor of the Express Company than it would be if the concession to carry only through freight over the Suburban road was made. And if the Traction Company should complete its line into East St. Louis it would become a rival of the Suburban Company in carrying passengers into East St. Louis.

Upon those grounds it was said by witnesses for the defendants that it was to the interest of the three interested parties, the Express Company, the Suburban Company and the Traction Company, that the contract of July 18, 1906, should be made. The evidence for the defendants also tended to show that by this contract of July 18th the Express Company acquired the right to run express cars between East St. Louis and Alton, and East St. Louis and Edwardsville. The Express Company claims that it had the right before the contract of July 18th was entered into, but the evidence shows that the claim was disputed and the Express Company had not been able to exercise it. There were other features of less importance in the contract of July 18th that, according to defendant's testimony, were of advantage to the Express Company.

The testimony as to the conditions that confronted the Express Company was undisputed and it shows that the charge of fraud against the defendants was unfounded. There being no fraud in the conduct

of the directors, if they acted within the scope of their lawful authority, their act was lawful.

Let us now see by what authority they acted in making this contract.

a. It is contended that the board of directors had no authority to make a contract to modify the contract of August 16, 1904, but that it could only be done by the stockholders.

The proposition is that the exclusive feature of the contract of August 16, 1904, constituted fully ninety per cent of the assets of the company and therefore represented ninety per cent of the capital stock, and when that feature is eliminated from the contract it reduces the capital stock of the corporation ninety per cent, and authorities are cited to show that a board of directors cannot increase or reduce the capital stock of a corporation. The proposition of law that a board of directors cannot increase or reduce the capital stock of the corporation is correct, but it is not applicable to the action of this board of directors in authorizing the making of the contract in question. This contract does not reduce the capital stock of this company, although it may affect the value of its shares, as any business contract may. It is also true that the "directors of a corporation cannot, unless thereto authorized by the shareholders, put an end to its business and defeat the objects of its creation by selling out *en masse* all its property and goodwill." [10 Cyc. 764.] But this contract had no such purpose or effect; if the managers of the company had been left alone to carry on its business under the new contract there is nothing in the record to show but that it might have entered on a more successful business career with the extended field of operation afforded by the new contract than it had theretofore enjoyed. But when these plaintiffs instituted this suit (which was before the Suburban Company had declared the contract forfeited), with their charges of

fraud, their prayers for injunction and for receivers, it was enough to destroy the credit of the company and to destroy that confidence in its management that had theretofore existed, and to induce the officers of the Suburban Company to declare the contract forfeited and decline to do any more business with the Express Company.

When the suit was filed one of the city newspapers, as the evidence shows, gave it a conspicuous notice, with head lines directing attention to the alleged fraudulent conspiracy of the officers of the Express Company with the officers of the Suburban Company. A publication of that kind is likely to arouse resentment on the part of the men whose integrity is assailed. In his letter to the president of the Express Company, who had written a conciliatory letter to him, the vice-president of the Suburban Company, giving as one of the reasons for insisting on prompt payment of the amount due, made reference to the "recent receivership proceedings and other public statements affecting the credit of your company."

Of course the company might have gone to the wall when trying to do business under the new contract even if there had been no suit, no one knows what might have been, but the fact is, as plaintiffs themselves say, that up to that time the Suburban Company had not insisted on prompt payment for the service rendered, but had indulged the Express Company reasonable time in which to make its payments after the same became due according to the contract, but within four days after the institution of this suit the Suburban Company served notice on the Express Company that thereafter prompt payment would be required, and unless made on the 15th of January, 1907, the contract would be declared forfeited, as the contract itself authorized; on January 16th the Suburban Company did declare the contract forfeited and

refused to furnish cars to the Express Company; then the receivers were appointed.

Whilst it is the law that the directors of a corporation have no authority to put an end to its life, yet if this corporation came to its death in consequence of the action of the Suburban Company in declaring the contract forfeited and refusing to furnish cars to carry on the business of the Express Company, who is to blame?

"The directors are merely the managers of the property and business of the corporation, and cannot therefore perform constituent acts, by which expression is meant acts which involve fundamental changes in the constitution of the corporation." [10 Cyc., p. 762.] But they are the managers of its business, and have authority to make contracts binding the corporation in the conduct of its business, and the contracts they make cannot be set aside at the suit of stockholders on the ground that they do not promote the best interest of the corporation.

We hold that the contract of July 18, 1906 (which includes also the construing contract of November 6, 1906), was within the legitimate scope of the powers of the board of directors in this case.

b. The meeting of the directors July 31, 1906, at which the contract in question was approved and the officers were authorized to execute it, was a special meeting and the objection which the plaintiffs take to its action is on the ground that the notice of the meeting did not specify the purpose of the call; but that is a mistake. The notice was: "This is to notify you that there will be a special meeting of the board of directors of the Electric Railway Express Company at this office at ten o'clock a. m. on Tuesday, July 31, 1906, for the purpose of then and there authorizing the president of this company to sign and enter into a certain contract with the East St. Louis and Suburban Railway Company bearing date July 16, 1906. And

for the further purpose of electing a director to fill the vacancy caused by the resignation of Martin J. Baker." At that date the draft of the contract submitted to the board bore the date July 16th, but it was redrafted before signing and dated July 18th. There was no material difference in the two drafts, in so far as concerns the plaintiffs' complaint. All the directors, four in number, attended that meeting and no objection was made to the notice; the contract was discussed and all of them voted on it. It is the same contract as that referred to throughout the record as the contract of July 18, 1906. The director who voted against making the contract vigorously opposed its adoption. "Clause by clause [he testified] I took up the contract and offered objections to it. Mr. Allen undertook to answer the objections which I raised." The objector then requested that the matter be laid over and he be given further time to examine it, but that was refused, because they said the manager of the Suburban Company was going away for the summer and action must be taken then. The proposition was put to a vote and carried three yeas and one no. We discover no illegality in the proceedings of that meeting.

c. The plaintiffs claim that there was a meeting of the board of directors on August 6, 1906, at which it was resolved that the contract bearing date July 16, 1906, which was presented "at a special meeting of the board of directors July 31, 1906, be disapproved, and the officers of this company be and are hereby forbidden to execute and deliver said contract unless the majority of the stockholders at a duly called meeting shall approve the same."

By the laws of the company it is provided: "Regular meetings of the board of directors shall be held at the office of the company on the first Monday of every month at ten o'clock a. m." On August 6, 1906, which was the first Monday in that month, at ten

o'clock a. m., two directors came to the office of Mr. Allen, which was the office of the company. Those two directors were the director who had opposed the execution of the contract at the special meeting July 31, and the director who had voted in favor of its execution but who two days thereafter notified the president of the Express Company and also the vice-president of the Suburban Company that he had been deceived into voting for it and was then opposed to the contract. Mr. Allen being in the office when they came in, there were three directors present. The two brought the resolution already written with them to the office. According to the testimony of the director who had voted no at the meeting July 31st, when the two entered the office he told Mr. Allen that they had come to hold a directors' meeting; that Mr. Allen said: "I recognize a quorum is present and I will have to put any motion you make;" but when the motion to disapprove the contract was made, Mr. Allen charged them with sharp practice and with trying to take advantage of him in the absence of the other director; "he started to leave the office, but did not get away until the motion was put and passed; that is, he did not get out of the room, he tried to." The secretary of the company being absent this director acted as secretary. The board had not been holding regular meetings on the day mentioned in the by-laws; it held a regular meeting in October, 1905, and one in February, 1906, not since.

The other one of these two directors was also a witness for plaintiffs on this point. He testified that he went there at the request of his companion. "Well, he said we would go down and pass these two motions. Q. He said if you went down Mr. Allen would be the only other director there and you could carry anything you wanted, didn't he? A. He didn't say that, but I guess he meant that. Q. And you knew that when you went down there neither Dr. Starkel nor Mr.

Weingaertner would be there? A. I knew it, yes, sir. Q. You knew that when you went in there and began negotiations, tried to have a meeting, that it was a fake meeting, didn't you? A. I don't know whether you would call it a fake meeting. Q. Well, I am not asking you what I would call it, but you knew that it was a fake meeting, didn't you? A. I am not familiar enough to know what a fake meeting is. I knew it was not a regular meeting that we had there. Q. You knew that it was not a *bona fide* meeting? A. I don't know how to answer that either. Q. Do you know what that word means? You knew the meeting was not a fair one to all the directors. A. Yes, sir. Q. You knew that Mr. Weingaertner and Dr. Starkel, if they were present, would not vote with you and Mr. Young? A. Yes, sir. Q. You made no effort to apprise them in any way that you were going to take this exceptional course and try to have a meeting on that day, did you? A. No." That director testified that soon after that meeting he resigned. "Q. Why did you resign? A. Why, I got thoroughly disgusted with the wrangle."

Mr. Allen's testimony was to the effect that when these two gentlemen came to his office he did not understand that they came to hold a directors' meeting, they talked in a conversational way about the contract, then one of them made a motion and the other seconded it; then Mr. Allen understood for the first time that they were trying to hold a meeting, he went to the telephone and communicated with his attorney and after getting his advice left the room. He denied that he said that he recognized that there was a quorum present, and would have to put any motion they made.

There is no legal process by which a director of a private business corporation can be forced to attend a meeting, and he cannot lawfully be compelled by physical force to attend, nor can he be trapped into an attendance against his will. It happened to be the

fact that Mr. Allen's office was the office of the company and he was there for his daily work, not expecting a meeting of the board. These gentlemen knew that they would find him there, knew the other directors would not be there and they planned to force a meeting at which they would constitute a majority. We hold that that was not a lawful meeting of the board of directors.

d. At a special meeting of the board on November 8, 1906, the minutes of the meeting of July 31st, approving the contract in question, were adopted.

At a meeting held November 27th the director who had voted no at the meeting of July 31st, offered a resolution to the effect that the company employ counsel to bring suit to set aside the contract of July 18th, and the contracts of subsequent dates, on the ground that they were entered into without authority and were void. The resolution was lost by a vote of three to two, the two being the two who attempted to hold a meeting on August 6th. Then the same director offered a resolution of like effect with the addition that the officers of the company had fraudulently conspired with the Suburban Company and others to enter into the contracts in violation of the rights of the stockholders of the company. Another director then moved to adjourn, stating as a reason therefor that he declined to sit in a meeting with a member who would offer such an insulting resolution; the motion was carried by a vote of three to two.

On December 15, 1906, a stockholders' meeting was held, at which a resolution was offered ratifying and approving the action of the officers in executing the contract of July 18th and November 6, 1906. Thereupon canvassers were appointed to collect the votes of the stockholders on the resolution and report at the regular annual meeting of the stockholders January 8, 1907. At that regular meeting the canvassers appointed reported, showing that there were 600

shares voted in favor of the resolution and 320 against it, and thereupon it was announced that the resolution was adopted and it was so entered on the record.

At the stockholders' meeting January 8, 1907, Mr. Allen stated that the Suburban Company had given notice that unless the car rental was paid on the 15th the contract would be declared cancelled, and he urged that action be taken to raise the money. After a full discussion the matter was referred to a meeting of the board of directors to be held on the 15th inst. That meeting was held and various ways and means were discussed, but the money was not raised. Mr. Allen offered to indorse the note of the company for the amount required, provided the director who had opposed the execution of the contract of July 18th would join him in the indorsement, but that director refused to do so, saying that plenty of money could be raised if the contract of July 18 and November 6, 1906, were cancelled, and the old contract of August 16, 1904, restored.

The evidence amply sustains the chancellor's findings of the facts and justifies the decree discharging the receivers and dismissing the plaintiff's bill.

II. By the decree in this case the contracts between the Express Company and the Suburban Company, under which the latter was to furnish to the former express cars to be carried over its road, are declared to be "canceled, forfeited and of no effect." On this the appellants make the point that a court of equity has not jurisdiction to declare a forfeiture. It is true the question of forfeiture is one to be dealt with by courts of law. A court of equity never interferes with the subject unless to prevent a forfeiture when conditions are such as to render it inequitable to allow it to be enforced. But that clause may be stricken out of this decree without changing its effect. The fact is, that part of the answer of the Suburban Com-

pany which undertakes to set up as if by cross-bill the facts justifying the action of that company in declaring the forfeiture, and praying the court to decree the contracts forfeited, was unnecessary and bad pleading. The plaintiff's petition stated that the Suburban Company had declared the contract forfeited and had refused to further perform its part, and then the petition went on to make statements showing why it would be inequitable to permit the forfeiture, and prayed that it be annulled and that the Suburban Company be required to continue its service. The general denial of the Suburban Company put in issue those statements and the court found that the evidence did not sustain the plaintiff's statements and dismissed their bill. That disposed of the question of the forfeiture as completely as if there had been no cross-bill or as if it had been ignored. The forfeiture having been declared by the defendant company, the plaintiffs having prayed the court to set it aside, and the court having refused in its final decree to do so left the forfeiture standing and that was the end of the subject. The plaintiffs were not prejudiced by the decree declaring the contracts forfeited, although the decree would have been in better form if that clause had been omitted.

III. On June 17, 1907, the court rendered the final decree, finding all the issues in favor of the defendants and dismissing the plaintiffs' bill; in the decree was the following: "And it is further ordered that said receivers pay out of the funds in their hands such other expenses and obligations incurred by such receivers in the management and conduct of the business of said Electric Railway Express Company that are unpaid. And it is further ordered that any balance that may be in their hands shall be applied to the payment of the receivers' certificates heretofore issued

by this court, pursuant to the order of court made on January 19, 1907, and that all other property shall be turned over to the defendant Electric Railway Express Company." On June 20, 1907, plaintiffs filed a motion for a new trial, which was by the court overruled October 7, 1907, and plaintiffs excepted. Appellants in their brief now say that there was at that time outstanding certificates issued by the receivers to the amount of \$4000, for money advanced them by plaintiffs, and that it was error in the court to order the property of the Express Company returned to it instead of having the property sold by the receivers and the proceeds applied to the payment of the certificates. They say in their brief that this property, which consisted in the main of horses and wagons, was, after it was returned to the Express Company, sold by the president of the company for \$4200, and he should now be required to pay those certificates out of that fund.

Without passing on the question of whether, under the facts of this case, the plaintiffs would have been entitled to have the personal property of the Express Company sold to reimburse them for the money they claim to have advanced, it is sufficient to say there is no such question now before us. In their motions for a new trial they did not assign that the court had erred in ordering the property turned back to the Express Company and there is no general assignment in the motion that covers the point. The motion for new trial was filed June 20, 1907, overruled October 7, 1907, appeal prayed and granted November 12, 1907, but it was not until January 31, 1908, that the plaintiffs filed a motion in the court asking that the order discharging the receivers be set aside and that the Express Company and its president be ordered to turn over to the receivers the proceeds of the sale of the property; that was several months after the final judgment had been rendered and more than two months after this appeal had been taken.

None of that matter is embraced in the bill of exceptions, and could not have been, because it did not occur during the proceedings covered by the bill of exceptions; it is all printed in the abstract, but is outside of the bill of exceptions. The bill of exceptions covers the proceedings at the October, 1907, term, this matter occurred at a subsequent term, and there is no bill of exceptions covering it; its insertion in the abstract is unauthorized.

A final decree determines the rights of the parties on all the points in issue; when there is a receiver in the case it is proper that in the final decree he should be directed to make disposition of funds and property in his hands and report subsequently what he has done in obedience to the decree. If his report filed at a subsequent term shows that he has acted contrary to the decree parties have a right then to except to his action, but if he has acted in accordance with the decree the party deeming himself aggrieved can be heard in an appellate court only on appeal from the decree. In this case the final report of the receivers was made at a subsequent term, but that report is not in this bill of exceptions, therefore we cannot take notice of it; there is no bill of exceptions covering that term, therefore we do not know what evidence if any was before the court; we do not know that there were at that time outstanding certificates or for what amount or who owned them; we have statements on those points in what purports to be the motion of plaintiffs filed at that subsequent term, but even that motion is not authenticated by a bill of exceptions, and is not a legitimate part of this record. Appellants in their brief say that when the motion was overruled they excepted, but the record does not so show.

If appellants should now take the position that there was no final decree until the order of the court approving the final report of the receivers and discharging them (which position would not be tenable)

they would on that theory be out of court entirely, because this appeal is from the decree rendered June 17, 1907; if that is not a final decree then this appeal is premature.

We find no error in the record. The judgment is affirmed.

THE STATE ex rel. ATLANTIC HORSE INSURANCE COMPANY v. FRANK BLAKE, Superintendent of Insurance.

In Banc, March 1, 1912.

1. **STATUTE: Amendment: Substitution: Intermediate Act: Insurance Company Capital.** When a section of a statute is amended or displaced by a later substituted act, and still later an act is enacted which in terms purports to amend the original repealed section, referring to it by section number, such intermediate amendment or substitute is to be regarded as if it had always been a part of, or in place of, the original section, and such last amendment of or substitute for the original act is valid. When Sec. 7957, R. S. 1899, was amended and displaced by the Act of 1901, which reduced the capital stock certain insurance companies must have to \$100,000, and in 1909 an act was passed which in terms purports to amend Sec. 7957, R. S. 1899, by requiring such companies to have \$200,000 capital, and which does not refer to the Act of 1901, the Act of 1909 applies to the intermediate substitute of 1901, which is to be regarded as if it had always been a part of said section 7957. The Act of 1901 was amended by the Act of 1909, and this act by the Act of 1911, and the insurance companies embraced within its provisions are required to have a capital of \$200,000.
2. **CONSTITUTIONALITY OF STATUTE: Raised by Foreign Corporation.** A foreign corporation which has never been licensed to do business in this State has no right to challenge the constitutionality of a statute which denies to it the right to be admitted to this State. A corporation organized in one State cannot as a matter of right immigrate into another, and no other State is bound to receive it within its borders, and it can enter only upon such terms as the State may see fit to impose; and until it is admitted a statute which imposes

State ex rel. v. Blake.

onerous conditions or even impossible conditions upon its original admission violates no right of such foreign corporation, and it is only persons whose rights are invaded that can question the constitutionality of a statute.

3. ———: ———: Invoking U. S. Constitution: Equality of Citizenship. A foreign corporation, which has never been admitted to this State, cannot invoke that part of the U. S. Constitution which says that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," nor that clause in the Fourteenth Amendment which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws." A corporation is not a citizen within the meaning of this constitutional provision, nor is an unadmitted foreign corporation a person within the jurisdiction of the State.

Held, by WOODSON, J., dissenting, that since relator has complied with all the laws of this State except the statutes it claims are unconstitutional and which deny to it a license, it has the same legal right that a domestic corporation has to question the constitutionality of that part of them that denies to it a right to a license.

Mandamus.

PEREMPTORY WRIT DENIED.

Charles H. Brock for relator.

(1) When it is the evident intention of the legislative body to amend the existing law in a single matter only, and the amendment is incorporated by mistake in a repealed statute, the court will hold that the amendment adheres to the existing law and is valid as to the said law. *Commonwealth v. Kenneson*, 143 Mass. 418; *People v. Canvassers*, 143 N. Y. 84; *State v. Corbett*, 61 Ark. 226; *Svennes v. West Salem*, 114 Wis. 650; *Reeves v. Gay*, 92 Ga. 309; *Custin v. Viroqua*, 67 Wis. 314; 1 *Lewis's Sutherland on Statutory Construction*, pars. 233, 234. (2) When the respondent sets up as a ground for refusing the license an act of the Legislature, the relator may attack the constitutionality of such act; and the court may, in mandamus proceed-

ings, pass upon its constitutionality. State ex rel. v. Turner, 210 Mo. 77; State ex rel. v. Vandiver, 222 Mo. 206. (3) A foreign corporation, seeking admission to a State under its valid laws, may attack the validity or constitutionality of a particular provision of the statute which is the sole reason for its exclusion from the State. State ex rel. v. Cooper, 18 N. D. 583; State ex rel. v. Vandiver, 222 Mo. 236, 249; Text-Book Co. v. Gillespie, 229 Mo. 397.

Elliott W. Major, Attorney-General, and *John M. Dawson* and *Campbell Cummings*, Assistant Attorneys-General, for respondent.

(1) A litigant asking relief by mandamus must show itself possessed of a clear and legal right to the remedy. State ex rel. v. Hudson, 226 Mo. 265. As a general rule, courts will not declare an act unconstitutional in an application for a writ of mandamus. State ex rel. v. McIntosh, 205 Mo. 635; 26 Cyc. 156. Relator will not be heard to complain that the statute is unconstitutional on the ground that its license to do business in this State will be a benefit to citizens therein. *Ordelheide v. Modern Brotherhood*, 226 Mo. 210; *McCully v. Railroad*, 212 Mo. 54. Relator, being a foreign, unlicensed corporation, is precluded from assailing the constitutionality of the Acts of 1909 and 1911. The law is well settled that foreign corporations licensed to do business in a State are precluded from challenging the constitutionality of laws in force in such State at the time the corporation was admitted to do business therein, and this principle should apply with greater force to the case of a foreign corporation seeking a license to entitle it to enter and do business in another State. State ex rel. v. Vandiver, 222 Mo. 206; *Daggs v. Ins. Co.*, 136 Mo. 398; *Ins. Co. v. Daggs*, 172 U. S. 566; *Railroad v. Kentucky*, 183 U. S. 503; *Ins. Co. v. Herriott*, 91 Fed. 711; 19 Cyc. 1317; *State v.*

Green Lake Co., 98 Wis. 143; Tel. Co. v. Tel. Co., 7 Houst. (Del.) 269. (2) The Act of April 17, 1911, with emergency clause, amending section 7008, Revised Statutes 1909 (not mentioned and not attacked in relator's brief), was in force and effect prior to the petition filed herein, and required a capital of \$200,000.

FERRISS, J.—This is an original proceeding in which the relator, a foreign insurance company, seeks by mandamus to compel the respondent to issue to it a permit to do business in this State. The cause is submitted upon a demurrer to the petition.

The relator is engaged in the business of live stock insurance, under charter from the State of Rhode Island, in which State it has its chief business office. On March 1, 1911, relator, having complied with all the laws of this State in that regard, save the statutory requirement of \$200,000 capital, demanded from the respondent a permit to do business in the State. This permit was refused upon the sole ground that relator, having a capital of \$110,000 only, failed to meet the requirement of section 7008, Revised Statutes 1909 (Laws 1909, p. 602), as amended by the Act of 1911 (Laws 1911, p. 271), then in force, and which requires such a company as this to have a capital of \$200,000 as a condition prerequisite to admission into this State.

Relator in its petition asserts that it is entitled to a permit notwithstanding this statute, because the Act of 1901, which requires a capital of \$100,000 only, has never been repealed or amended, and is still in force, and because the Act of 1909, if its effect is to amend said Act of 1901, is violative of both the State and Federal Constitutions, and therefore void. The respondent challenges the legal sufficiency of the petition.

The case presents three questions:

1. Do the statutes, properly construed, require this corporation to have a capital of \$200,000 as a condition of its admission?

2. Is the relator entitled to challenge the validity of the Act of 1909, now section 7008, Revised Statutes 1909?

3. Is the Act of 1909 a valid law?

Whether this last question shall be considered depends upon our answer to the second question.

I. Prior to 1901 the statute required such a foreign corporation as this to have a capital of \$200,000. [R. S. 1899, sec. 7957.] In 1901 the Legislature, by the terms of an act entitled, "An Act to repeal section 7957 of article 4 of chapter 119 of the Revised Statutes of Missouri 1899, and to enact a new section in lieu thereof to be known as section 7957, and to take the place of said section in said Article 4 of said chapter 119, and relating to insurance," reduced the capital requirement to \$100,000, but otherwise re-enacted substantially section 7957.

So stood the law until 1909, when the Legislature amended section 7957, Revised Statutes 1899, by a bill with this title: "An Act to amend sections 7877 and 7957 of chapter 119 of the Revised Statutes of Missouri for the year 1899, relating to insurance, by inserting in each of said sections a clause permitting the investment of funds in bonds issued by school-districts of the State of Missouri." In the body of the act appears a provision requiring a capital of \$200,000, being similar in this regard to the original section in Revised Statutes 1899 as it stood prior to the Act of 1901, which reduced the required capital to \$100,000. The Act of 1909 also provides for the investment in school bonds, as indicated in the title.

Relator claims that the original section 7957, Revised Statutes 1899, had been repealed by the Act of

1901, and that consequently the Act of 1909, which purported to amend section 7957, Revised Statutes 1899, and which did not refer to the Act of 1901, was inoperative, and left the Act of 1901 in full force; also that by the same reasoning the amendatory Act of 1911 is likewise inoperative to affect the Act of 1901.

In our opinion the contention of relator in this regard is unsound. The Act of 1901, by its terms, took the place of section 7957, Revised Statutes 1899, and became, after it took effect, to all intents and purposes, section 7957, Revised Statutes 1899, and subsequent reference to said section applied to the said 1901 act. Consequently, when the Act of 1909 amended said section, such amendment referred to the Act of 1901, which had been substituted for said section 7957.

The rule of law is that when a section of a statute is amended or displaced by a later substituted act, and still later an act is passed which in terms purports to amend the original section, referring to it by number, such last amendment applies to any intermediate amendment of, or substitution for, the original section, such intermediate amendment or substitute to be regarded as if it had always been a part of, or in place of, the original section. [State v. Schenk, 238 Mo. 429; Kamerick v. Castleman, 21 Mo. App. 587; Blake v. Brackett, 47 Me. 28; Greer v. State, 22 Tex. 588; Rowan v. Ide, 107 Fed. 161; Endlich on Int. of Stat., sec. 294; McKibben v. Lester, 9 Ohio St. 627.]

In the last-named case the court said: "When one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections as amended must be construed as though introduced into the place of the repealed section or sections in the original act."

II. The right of a foreign corporation, seeking admission into this State, to challenge the constitutionality of a Missouri statute which refuses such admission, is a question of first impression in this court. We have in the case of *State ex rel. v. Vandiver*, 222 Mo. 206, permitted a foreign insurance company, doing business in this State under a permit, to question the validity of a condition subsequently imposed by the Legislature upon the granting of the annual renewal certificate. The reasons for that ruling are not discussed in the opinion of the court, but are set out in the dissenting opinion by GRAVES, J., concurring on this point, however, with the majority opinion.

The consideration of some general principles everywhere recognized will indicate clearly that a foreign corporation which has never been admitted into the State, as is the case here, but is standing, a stranger at the door, asking to be let in, occupies a position quite different from that of a corporation which has been admitted and has for many years done business within the State, and acquired property interests, thereby earning recognition as a "person" within the jurisdiction of the State.

A corporation exists by right only within the State that gave it the right to exist. It is purely a creature and creation of law, and the law of its being has no extraterritorial force or effect. Consequently, it cannot as a matter of right immigrate into another State, and no other State is bound to receive it within its borders. The permit which authorizes a foreign corporation to come into this State rests not on any right belonging to the corporation, but alone on comity, and the permission may be withheld for a good or a bad reason, or for no reason at all, and it may be granted upon such conditions as the State may see fit to impose. [*Daggs v. Ins. Co.*, 136 Mo. 393; *State ex rel. v. Vandiver*, supra; *Paul v. Virginia*, 8 Wall. 168; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246.]

It follows from the foregoing that a statute of this State, imposing an onerous or even impossible condition upon the original admission of a foreign corporation, violates no *right* of such corporation.

Laws enacted by the Legislature are presumed to be valid, and even if defective because violative of some provision of the State Constitution, are not void, although they may in a proper case be voidable; that is, upon complaint by a party whose *rights* are impaired by such statute. Upon this point Cooley says:

“The statute is assumed to be valid, until some one complains whose rights it invades. ‘Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of the legislative power, and to this extent only, therefore, are courts of justice called on to interpose.’” [Cooley’s Const. Lim. (5 Ed.), p. 197.]

The foregoing text is substantially the language of SHAW, C. J., in *Wellington*, Petitioner, 16 Pick. 87, which thoroughly discusses this question. The general doctrine that only one whose rights are invaded can assail the validity of a statute is amply sustained by authority.

In *Williamson v. Carlton*, 51 Me. 1. c. 453, the court, while asserting the power of the court to declare an act a nullity, says: "But at whose instance shall this be done? Plainly those whose rights were injuriously affected by the act complained of, their representatives or assigns, and *they only* can call upon the court to do this. A stranger to those rights, merely interposing a cavil at the tenure by which a neighbor holds his property, cannot be permitted to do it."

In *Plumb v. Christie*, 103 Ga. 686, the court says: "Before a law can be attacked by any citizen on the ground of its unconstitutionality, he must show that its enforcement is an infringement upon his rights of person or property."

To the same effect are *Smith v. Inge*, 80 Ala. 283; *Dejarnette v. Haynes*, 23 Miss. 600.

A close analogy may be found in the decisions of this court. In *State v. Siebold*, 192 Mo. 720, Siebold objected to the validity of a dramshop law which gave to the excise commissioner power to revoke his license. We held that "a license to sell intoxicating liquors is not property, but a mere privilege subject to revocation or to such conditions as the State may see fit to impose," and that therefore Siebold was "in no position to raise objection" because "his personal or property rights are not affected by the act of the excise commissioner." We cite in the Siebold case, with approval, the statement of the law by Cooley, quoted above, and other authorities to the same effect.

Relator asserts that the Act of 1909, which bars its admission because of insufficient capital, violates the State Constitution in that the amendatory provision requiring a capital of \$200,000 is not within the title of the act. We hold, however, that as relator has no right to admission into the State which the statute violates, it is not in position to challenge the validity of the statute. Nor can relator invoke the aid of section 2, article 4, of the Constitution of the

United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;" nor the aid of the Fourteenth Amendment, which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws." A corporation is not a citizen within the meaning of the above constitutional provision; nor is relator, although a "person," within the jurisdiction of the State. [Paul v. Virginia, supra; Blake v. McClung, 172 U. S. 239.]

Herein lies the distinction between the case at bar and the Vandiver case, supra: In the Vandiver case a renewal certificate was refused a foreign insurance company which had been doing business in the State for many years, its license having been renewed at the end of each year, as provided by statute. In 1907 the Legislature enacted a statute which, if valid, imposed upon the relator a new and burdensome condition upon the issuing of a further renewal certificate, whereupon, the relator failing to comply with the Act of 1907, the Superintendent of Insurance refused the renewal license. In the mandamus proceedings instituted by the insurance company to compel the issuance of the renewal certificate the Attorney-General earnestly contended that the relator had no standing to contest the validity of the statute. This contention was made upon the ground that the relator, when asking for a renewal license, was in legal effect in the same position as if it were seeking original admission into the State, and that a foreign corporation had no right, merely because it was trying to gain admission into the State, to question the constitutionality of a statute of the State. This last proposition was practically conceded by the relator in that case. Its contention in that behalf was that it was already domiciled in this State, and hence was a person within its jurisdiction. This contention of the company was in effect sustained by this court, which, without discussing the point in

the majority opinion, heard the case and passed upon the constitutionality of the act in question. In his dissenting opinion, GRAVES, J., in the course of his discussion of the point, said:

“This petition for mandamus relates back to the time when relator was entitled to have its report passed upon and approved or rejected, at which time relator was legally domiciled in this State, although a foreign corporation. By this statement we mean that it was so domiciled in the State as to give it the right to challenge unconstitutional laws. It acquired that right by virtue of the original certificate, and the renewed certificate is but to the effect that it was still in good standing under the original certificate, which original gave to it admission to the State. Under the facts in this record, we are of opinion that relator is in position to question the constitutionality of the law now under consideration. And in this we heartily concur in what we take to be an acquiescence in this position by the majority opinion.”

He says, further, on page 249:

“It may be true (a question we do not decide, because unnecessary in this case) that a foreign corporation, not domiciled in the State but simply applying for admission, cannot even question a law upon the statutes at the time of its proposed entry in the State, yet that does not affect this case, because the Act of 1907 was passed whilst relator was actually in the State, doing business.”

The Vandiver case was briefed, argued and decided upon the proposition that the right to mandamus rested upon the fact that the foreign corporation was at the time it applied for the renewal certificate domiciled within the State, and it was strongly intimated, although not expressly decided, that a foreign corporation, seeking original admission into the State, would have no standing to maintain mandamus proceedings

to challenge the constitutionality of a statute of the State.

Holding, as we must, that the relator cannot attack the validity of the statute which, as we have construed it, denies relator admission into the State, it follows that respondent was right in refusing the license, and the peremptory writ must be denied. It is so ordered. All concur, except *Woodson, J.*, who dissents in opinion filed; *Kennish, J.*, concurs in the result only.

DISSENTING OPINION.

WOODSON, J.—I dissent from the opinion in this case, for the reason that the record shows that the relator has complied with all the laws of this State, except the statutes which it claims are unconstitutional. If unconstitutional, then they are the same as if they had never been enacted, and if never enacted then clearly under the facts disclosed by this record, the writ would have to go.

That being true, I think that under section 1 of article 14 of the Constitution of the United States, the relator has the same legal right to test the constitutionality of those statutes, in the courts of this State, that a domestic corporation has.

There is a broad distinction between the right of a foreign corporation to sue in the courts of this State, and the right to do business herein.

In the case at bar, the relator is not claiming the right to do business here, but is simply asking the courts of this State to declare whether or not it has so complied with the laws of this State as to entitle it to a license to do business herein; and if so to command the Superintendent of Insurance to issue such a license.

I think both this court and the Supreme Court of the United States have clearly held that relator is en-

titled to be heard in the courts of this State. [State ex rel. v. Turner, 210 Mo. 77; McCully v. Board of Railroad Commissioners, 212 Mo. l. c. 54 to 59; United Shoe Machinery Co. v. Ramlose, 231 Mo. 508; International Text-Book Co. v. Gillespie, 229 Mo. 397; Chambers v. Baltimore & Ohio Ry. Co., 207 U. S. 142, 148; State ex rel. v. Grimm, 239 Mo. 135.]

In my opinion the alternative writ should be made permanent.

JOHN SCOTT et al., Appellants, v. PARKVIEW
REALTY AND IMPROVEMENT COMPANY.

In Banc, March 1, 1912.

1. **APPEAL: Nonsuit as to Some Counts: Verdict as to Others: One Final Judgment.** Where plaintiff suffered nonsuit as to two counts in his petition, and the trial proceeded to a verdict on the others, and one judgment was entered, reciting the nonsuit on some of the counts and a judgment for defendant thereon, and a verdict on the others and a judgment for plaintiff on them, and thereafter plaintiff filed his motion to set aside the judgment of nonsuit, and it being overruled he appealed, there was but one final judgment, and that embraced the whole case, and plaintiff can maintain his appeal, and the court will pass only on the correctness of the involuntary nonsuit.
2. ———: ———: ———: ———: **Effect of Reversal.** But if the judgment is reversed, the reversal will be as to the whole judgment, but the verdicts as to the two counts on which plaintiff had judgment will not thereby be set aside, but they will be reserved, and incorporated in the final judgment to be rendered after a trial on the other counts as to which he suffered a nonsuit.
3. **CONTRACT: Grading: Amount of Overhaul: Engineer's Interpretation.** Under plaintiffs' contract to grade 200 acres of land, they were to be paid eighteen cents per cubic yard when the average haul was 1400 feet, and in addition three-fourths of one cent per cubic yard for every 100 feet of average haul in excess of 1400 feet. The contract required the plaintiffs

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to do the work "in accordance with directions which may from time to time be given by the engineer for the party of the second part in charge of the work;" also that "the engineer's opinion as to the increase of haul is to be binding on both contracting parties;" but "that nothing herein contained shall be construed to affect the right of the party of the second part, hereby reserved, to reject the whole or any portion of the work should the engineer's certificate of the amount and value of the work be found or known to be inconsistent with the terms of this agreement or otherwise improperly given." *Held*, that the apparently inconsistent clauses of the contract can be reconciled only by holding that the opinion of the engineer in matters pertaining to the science of engineering should be binding on both parties, but it did not give to him power to judge the law of the case, and his certificate was not binding on either party if it was contrary to the terms of the contract; *and*, since he testified that he did not object to the way plaintiffs did the hauling and that he measured the overhaul not by the way it was actually done, but in the way he thought it might have been done, and that if his certificate were accepted the plaintiffs would lose \$50,000 on the work, his certificate is not final as to the value of the work. He had no power to substitute for the actual overhaul done the overhaul which might have been effected with different means and under a different plan of operation. He had no power to construe the contract to mean what it did not say. Its interpretation is for the court.

4. ———: ———: ———: ———: Means to be Employed: Contractor's Right Where Contract is Silent. Where a grading contract provided that the contractor should be paid eighteen cents per cubic yard when the average haul was 1400 feet and three-fourths of a cent in addition for every 100 feet of average haul in excess of 1400 feet, and the contract did not specify the appliances to be used for hauling, the contractor had the right to decide what was the most economical and expeditious manner of doing the work. Instead of doing it with spades, scrapers, wagons and teams, he had a right to do it with steam shovels, engines and cars, on a railroad track erected by him for that purpose.
5. ———: ———: ———: ———: No Objection Amounts to Consent. And where the engineer was on the ground and saw how the haul was being done, and did not object to the method being used, his failure to object amounted to consent to the use of the steam shovels, cars and railroad track; and since under the contract the engineer was the landowners' vice-principal, his consent was theirs.

6. ———: ———: **Settlement: No Counterclaim.** Where the counterclaim pleaded by defendant—to-wit, that liquidated damages at the rate of \$500 a day if the work was not completed within a given time were to be deducted—was not supported by any evidence that it was taken into account when the settlement was made, but all the evidence is that the defendant in the negotiations took the position that it would pay only what the engineer certified was due and no more, and his estimates of what defendant owed did not include that item, there is no such accord and satisfaction as bars a reopening of the account. The settlement was not a compromise, because defendant conceded nothing.
7. ———: ———: ———: **Receipt in Full: Exception.** Part payment of a debt is not a discharge of the whole obligation, even when the creditor gives a receipt in full. But an exception to that rule is that, when there is an account between the creditor and debtor sufficiently involved to afford the basis of a fair dispute as to the amount due, and after full consideration the creditor yields to the debtor's view and agrees to accept the amount which the debtor concedes to be due and gives a receipt in full, and there is no other controlling consideration or matter, the settlement is binding, for then it comes under the head of account stated.
8. ———: ———: ———: ———: **Threatened Insolvency: Misrepresentation: Coercion.** Where the defendant conceded a certain sum to be due plaintiffs and told them they could accept that or nothing, and plaintiffs informed the defendant's president that they were going to sue for the amount they claimed to be due, and he thereupon said it would suit the company just as well to be sued, because if the company should settle then it would have to borrow the money it proposed to pay, whereas a lawsuit would last three years or longer, and in the meantime if the company was successful in disposing of its property it would have enough to pay the whole of plaintiff's claim or else it would be insolvent and plaintiffs would get nothing; and plaintiffs looked up the matter and were satisfied the prospect of insolvency as foreshadowed by the president was correct, and they then yielded to defendant's demand and settled, giving a receipt in full, but thereafter upon further investigation they ascertained that the representation as to insolvency was not true, the settlement is not such an accord and satisfaction as bars plaintiffs from recovering what is due them, for the president thereby introduced an element of coercion into his offer, and did not deal fairly with his creditor, and hence is not entitled to the advantage so obtained.

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9. ———: ———: ———: ———: **Concealment.** A concealment of the available assets of a corporation by its president, in his discussion of the company's solvency and ability to pay its debt to plaintiffs, when because of his representation that it was insolvent plaintiffs were induced to give a receipt in full of their claim, is a material fact bearing on the question of the fairness of the alleged settlement, whether the concealment was intentional or not.
10. ———: ———: ———: ———: **Coercion: Misrepresentations: Fraud.** Where plaintiffs sue for the balance due on account, and defendant pleads settlement, and plaintiffs reply that the settlement was coerced by defendant's representations that it was insolvent, it is no defense that such representations were true and therefore there was no fraud. Such a suit is not a case of obtaining goods under false pretense. It is the case of a debtor, professedly able then to pay what he conceded to be due, refusing to pay it, and coercing his creditor to execute a receipt in full by holding up to him the prospective insolvency of the company. If the settlement was coerced under such circumstances it was not fair, and whether it was so obtained is a question of fact for the jury.

Appeal from St. Louis County Circuit Court.—*Hon. J. W. McElhinney, Judge.*

REVERSED AND REMANDED (*with directions*).

Kinealy & Kinealy for appellants.

(1) This being an appeal from the action of the court in refusing to set aside nonsuits as to the first and third counts of the petition, plaintiffs' evidence is to be taken as true, defendant's contradictory evidence as untrue, and every inference of fact made in favor of plaintiffs which can reasonably be drawn from the evidence so considered. *Forbes v. Dunnavant*, 198 Mo. 193; *Mockowik v. Railroad*, 196 Mo. 550. (2) The provision of the contract that "the engineer's opinion as to the increase of haul is to be binding on both the contracting parties" did not make the engineer an arbitrator for the construction of the contract. What was meant by the "haul" is to be determined by a proper interpretation of the contract, and therefore

even if Mr. Pitzman had had the right to make up the estimate it was not binding, because based upon an erroneous construction of the contract. *Lewis v. Railroad*, 49 Fed. 708; *Williams v. Railroad*, 112 Mo. 463; *Wilcox v. Baer*, 85 Mo. App. 587; *Elevator Co. v. Mertz*, 107 Mo. App. 28; *Carr v. Lackland*, 112 Mo. 442; *Const. Co. v. Tie Co.*, 185 Mo. 25; *Patterson v. Camden*, 25 Mo. 13; *Ganson v. Madigan*, 15 Wis. 153; *Railroad v. Moynihan*, 179 Mo. 629. (3) And to have been binding the estimate would have had to be made up by the engineer in the utmost good faith and without any ulterior purpose, and under the evidence in this case that was a question for the jury. *Williams v. Railroad*, 112 Mo. 463; *Lewis v. Railroad*. 49 Fed. 708. (4) The fact that the receipt given in this case purports to be in full of the amount due for the work done does not bar appellants from maintaining this action for the balance really due. *Sawyer v. Walker*, 204 Mo. 133; *Anll v. Trust Co.*, 149 Mo. 1; *Dawson v. Wombles*, 111 Mo. App. 532; *Ireland v. Spicard*, 95 Mo. App. 53; *Rivers v. Blom*, 163 Mo. 442; 23 Am. & Eng. Ency. Law (2 Ed.), 989, tit. Receipts. (5) The court erred in holding as a matter of law that the defendant had established, as a defense to the first and third counts of the petition, the affirmative defense set up in the amended answer and that for that reason the plaintiffs were not entitled to recover on either of those counts. *Dalton v. Poplar Bluff*, 173 Mo. 39; *Miliken v. Commission Co.*, 202 Mo. 637; *Asphalt v. Transit Co.*, 102 Mo. App. 469; *Dawson v. Wombles*, 111 Mo. App. 532. (6) The court was not justified in forcing appellants to a nonsuit on the theory that there was a *bona fide* dispute between the parties which was settled by the payment of a less amount than was actually due for the following reasons: (a) Because neither from the receipt nor the extrinsic evidence does it appear that the consideration for the payment of the money was the settlement of an existing dispute

between the parties. *Siewing v. Tacke*, 112 Mo. App. 414; *Ins. Assn. v. Wickham*, 141 U. S. 564; *Perkins v. Headley*, 49 Mo. App. 556; *Milling Co. v. Insurance Co.*, 105 Mo. App. 146; *Steinwender v. Creath*, 44 Mo. App. 356; *Ham v. Barrett*, 28 Mo. 388; *Bluedorn v. Railroad*, 121 Mo. 258; *Erhart v. Dietrich*, 118 Mo. 418; *Winter v. Supreme Lodge*, 96 Mo. App. 1. (b) Because the question of the measurement of the haul had long before the date of the final payment on February 1, 1904, been settled and agreed upon between the parties and thereby became liquidated and thereafter the defendant could not, had it so desired, reopen the question so as to make it a live dispute in good faith. *Ins. Assn. v. Wickham*, 141 U. S. 564; *Harrison v. Iron Works*, 96 Mo. App. 348; 19 Am. & Eng. Ency. Law, p. 391; *Pollman Co. v. St. Louis*, 145 Mo. 651. (c) Because even if there had been a dispute between the parties the question of its good faith was for the jury. *Goodson v. Acc. Assn.*, 91 Mo. App. 339; *Chamberlain v. Smith*, 110 Mo. App. 657; *Lightfoot v. Hurd*, 113 Mo. App. 612. (7) The court erred in excluding the evidence offered by appellants to show that respondent's capital stock had not been fully paid but that a number of its stockholders were financially able to respond to a judgment. The evidence was competent on the question of *bona fides*. (8) The compromise and settlement of this same dispute by the payment of the same final payment here involved having been pleaded as an affirmative defense to the fifth and sixth counts of the petition as well as to the first and third, and the verdict and judgment having gone against defendant upon said fifth and sixth counts on said affirmative defense, and defendant not having appealed from that judgment, that defense has now become *res adjudicata* against respondent. *Wilson v. Boughton*, 50 Mo. 17; *Young v. Byrd*, 124 Mo. 590; *Case v. Bridge Co.*, 58 N. Y. Super. 435; *Water Works Co. v. School Dist.*, 23 Mo. App. 227; *West v. McMullen*,

112 Mo. 405; *Kimberly Co. v. Young*, 90 Mo. App. 505; *State ex rel. v. Railroad*, 149 Mo. 109.

Henry S. Caulfield, George W. Lubke and George W. Lubke, Jr., for respondent.

(1) This court will not review the action of the trial court in sustaining the demurrer to the evidence, because eight exhibits which were in evidence before the trial court and which were introduced by appellants have been lost by the appellants, and are not contained in the bill of exceptions or the abstract of either party, and no evidence of their substance is available. *Christopher v. White*, 42 Mo. App. 428; *Vandeventer v. Goss*, 190 Mo. 239; *McCullough v. De Witt*, 163 Mo. 306; *Rutledge v. Tarr*, 95 Mo. App. 265; *Deering v. Hannah*, 93 Mo. App. 618; *Costello v. Fesler*, 80 Mo. App. 107; *Brand v. Cannon*, 118 Mo. 595; *Tobacco Co. v. Walker*, 123 Mo. 670; *Doherty v. Noble*, 138 Mo. 25. (2) The final estimate and certificate of the engineer was binding upon the appellants. *Williams v. Railroad*, 153 Mo. 487; *Howard County v. Baker*, 119 Mo. 407; *Chapman v. Railroad*, 114 Mo. 549; *McCormick v. St. Louis*, 166 Mo. 315; *Iron Co. v. Halverson*, 48 Mo. App. 383. (3) The appellants by acting upon the final estimate, receiving the checks of respondent based upon the final estimate, and receipting to the respondent in full for all claims under the contract, and still holding and retaining the money, gave to the final settlement the force and effect of an account stated. *McCormick v. St. Louis*, 166 Mo. 315; *Coal Co. v. St. Louis*, 145 Mo. 651; *McCormick v. Transit Co.*, 154 Mo. 191; *Adams v. Helms*, 55 Mo. 468; *Lindersmith v. Land Co.*, 31 Mo. App. 258. (4) Such settlement is so far conclusive between the parties that it cannot be reopened or gone into either at law or in equity, except upon clear proof of fraud or mistake, and not even then where, as here, the party attacking the set-

tlement was aware when he made it of the facts upon which he bases his claim for relief. There is no claim that there was a mistake here. McCormick v. Railroad, 154 Mo. 191; Pickel v. Chamber of Commerce Assn., 10 Mo. App. 191; Lindersmith v. Land Co., 31 Mo. App. 258; Dengler v. Auer, 55 Mo. App. 548; Marmon v. Waller, 53 Mo. App. 610; Kronenberger v. Binz, 56 Mo. 121; Kent v. Highleyman, 28 Mo. App. 614; Buffington v. Land Co., 25 Mo. App. 492; Marshall v. Larkins Son, 82 Mo. App. 635; Quinlan v. Keiser, 66 Mo. 603; Cannon v. Sandford, 20 Mo. App. 590; Morgan v. Joy, 121 Mo. 682; Mitchell v. Henley, 110 Mo. 598; Gens v. Hargadine, 56 Mo. App. 245. (5) There was no fraud in the procurement of the settlement. Bullock v. Woolridge, 42 Mo. App. 356; Davidson v. Hobson, 59 Mo. App. 130; Bryan v. Hitchcock, 43 Mo. 527; Parker v. Marquis, 64 Mo. 38; Hamilton v. Mallett, 8 Mo. App. 584. (6) The evidence conclusively shows a completed compromise or accord and satisfaction. Maack v. Schneider, 51 Mo. App. 92; Brink v. Garland, 58 Mo. App. 356; Tumilty v. Tumilty, 13 Mo. App. 444; Franklin v. Railroad, 97 Mo. App. 473; Cogan v. Railroad, 101 Mo. App. 179; Pickel v. Chamber of Commerce Ass'n, 10 Mo. App. 191; Marshall v. Larkins Son, 82 Mo. App. 636; Rawlins v. Rawlins, 102 Mo. 563; Tansey v. Railroad, 90 Mo. App. 101; Knorp v. Wagner, 195 Mo. 637; Coal Co. v. St. Louis, 145 Mo. 653; Darwin v. Westbrook, 71 Hun (N. Y.) 405; Boteler v. Roy, 40 Mo. App. 334; School Board v. Hull, 72 Mo. App. 409; Henson v. Stever, 69 Mo. App. 136; Gens v. Hargadine, 56 Mo. App. 245; Reilly v. Chouquette, 18 Mo. 220; State ex rel. v. Ewing, 116 Mo. 136. (7) The verdict and judgment upon the fifth and sixth counts of the petition are not *res adjudicata* on the question of a settlement of the cause of action set forth in the first and third counts. State to use v. Kaye, 83 Mo. App. 678; Winham v. Kline, 77 Mo.

App. 36; Spurlock v. Railroad, 76 Mo. 67; Tutt v. Price, 7 Mo. App. 194; Dickey v. Heim, 48 Mo. App. 114; Foundry & Mach. Co. v. Mfg. Co., 100 Mo. App. 414. (8) The court did not err in excluding the evidence of how respondent's capital stock was paid up.

VALLIANT, C. J.—Plaintiffs sue to recover a balance claimed by them to be due from defendant for work done in grading a certain tract of land belonging to defendant lying partly in the city and partly in the county of St. Louis.

The petition is in six counts; before entering on the trial plaintiffs dismissed their second and fourth counts, and went to trial on the first, third, fifth and sixth. At the close of the evidence on both sides the court at the request of defendant gave instructions to the jury to the effect that as to the first and third counts the plaintiffs were not entitled to recover, whereupon the plaintiffs took a nonsuit with leave as to those two counts; the trial progressed as to the fifth and sixth counts, resulting in a verdict in each for the plaintiffs; thereupon a judgment was rendered to the effect as to the first and third counts the plaintiffs take nothing by their writ, and that as to the fifth and sixth counts they have and recover of defendant the amounts awarded the plaintiffs by the verdicts of the jury. In due time plaintiffs filed their motion to set aside the judgment of nonsuit, which motion the court overruled and the plaintiffs in due form applied for and obtained an appeal to this court.

The plaintiffs' complaint here is that the court erred in giving the instructions that forced them to a nonsuit on the first and third counts; no appeal was taken by defendant and no complaint is made by the plaintiffs as to the judgment in so far as it disposes of the fifth and sixth counts.

I. It is contended that this appeal should be dismissed, because, it is said, there is a final judg-

ment as to the fifth and sixth counts, but none as to the first and third. The argument is that since under our statute, section 1973, Revised Statutes 1909, there can be but one final judgment in a case, although there may be several causes of action united in one petition, and the plaintiffs having allowed final judgment to be entered in their favor on the fifth and sixth counts without disposing of the first and third, their only course now is to allow this appeal to be dismissed and bring a new suit on the first and third counts. But that argument overlooks the fact that this judgment as the record shows disposes as well of the first and third counts as it does of the fifth and sixth, it is as final a judgment as to the first and third counts as it is to the fifth and sixth, it is as final a judgment as a circuit court can render and the whole case is disposed of in one final judgment. The judgment, after reciting facts leading to the nonsuit, continues: "And thereupon the plaintiffs by leave of court take a nonsuit as to said first and third counts of said petition, with leave to move to set the same aside; and it is accordingly ordered and adjudged by the court that plaintiffs take nothing by this their suit as to said first and third counts of said petition." Then the judgment goes on to recite the verdicts of the jury on the fifth and sixth counts and continues: "It is therefore considered and adjudged by the court that plaintiffs have and recover against said defendant the sum of nine hundred and twenty-two dollars, said sum being the aggregate of said sums of \$872 and fifty dollars, damages assessed by the jury as aforesaid," together with interest and costs, etc.

The motion to set aside the nonsuit stands in the same relation to that part of the judgment as a motion for a new trial would stand to the part of the judgment that is based on the verdict of the jury; the motion does not annul the judgment; the appeal that follows is from the judgment, not from the order over-

ruling the motion. In theory the judgment follows the order overruling the motion, though in practice it precedes it. A judgment of nonsuit may not end the litigation, because another suit may be brought on the same cause of action, but it ends that suit, and is as to that suit as much a final judgment as a judgment on the merits would be.

A party cannot appeal from a judgment that is wholly in his favor, one that gives him all he asks, but he may appeal from a judgment that gives him only a part of what he sues for. If the plaintiffs should prevail in this appeal the judgment will be reversed, not only that part relating to the first and third counts, but that part relating to the fifth and sixth also, but the verdicts will stand, there being no appeal in relation to them, and the judgment on them will be reserved to be made a part of the final judgment in the case when all the issues are tried.

The judgment rendered by the circuit court in this case fully conforms to the requirement of the statute that there shall be but one final judgment; and if the trial court was correct in its conclusions it is the only judgment it could have rendered. Respondent insists that the appeal should be dismissed for the reason that appellant has failed to bring up parts of the testimony.

Respondent has availed itself of its privilege to file an additional abstract and has also filed a statement of facts. It is not made to appear from respondent's motion to dismiss or its showing in support thereof that the part of the testimony alleged to have been omitted by appellant is material to the question of law presented to this court for consideration.

The abstracts filed by both parties put this court in possession of sufficient facts to enable us to decide the only real question in the case, that is, whether the trial court was justified in forcing the plaintiffs to a nonsuit on their first and third counts. The motion to dismiss is overruled.

II. The suit grows out of a grading contract. The first count is on the contract, the third is for the same demand but is in the form of an action *quantum meruit* for work and labor done. The answer besides a general denial pleads a settlement, accord and satisfaction; the reply is a plea of confession and avoidance, that the alleged settlement was obtained by misrepresentation and duress and was without consideration. The case seems to turn chiefly on the issue of accord and satisfaction as alleged in the answer and avoided in the reply.

The contract called for excavating earth in the high places, hauling and depositing it in the low places, for which plaintiffs were to be paid eighteen cents per cubic yard when the average haul was 1400 feet, and, in addition thereto three-fourths of one cent per cubic yard for every 100 feet of average haul when it exceeded 1400 feet. The main controversy in the case is in reference to the plaintiffs' claim for that overhaul. When the work was fully completed the engineer in charge made his final estimate showing excavating and grading of 2,053,585 cubic yards at eighteen cents, plus allowance of 260 feet as excess of overhaul, the whole amounting to \$409,692.20, which after deducting amounts of previous payments left due plaintiffs \$72,497.70. Plaintiffs in their bill rendered claimed that the true overhaul was 506 feet more than the 260 feet allowed by the engineer, which at the contract price showed the amount due the plaintiff to be \$77,933.94 in excess of the \$72,497.70 balance shown by the engineer's final estimate.

III. There is no dispute of the fact that the engineer did not estimate the overhaul as it actually was, but he estimated it on a plan of his own devising which he thought was just. The engineer, who was the defendant's agent in charge of the work, and under whose direction the contract required the work

to be done, was a witness for defendant, and on this point testified: "I did not measure it the way they hauled it, because I had never given any direction or consent to hauling it in that way, but simply did not object to it, and because they increased the haul themselves and because the contract provided that the haul should be calculated according to the judgment of the engineer in charge. To do this entire grading of two million cubic yards with teams and wagons would require 100 teams 400 days, if they carried fifty yards a day, which is a fair allowance. Now then operating 100 teams on 200 acres of land, they would not interfere with each other, unless the work was purposely done so as to make them interfere. As near as I can estimate Messers. Scott lost \$50,000 on this work." That is defendant's own testimony on that point, adduced to justify the measurement, not according to the fact, but according to what the engineer thought was just. The contract required the plaintiffs to do the work "in conformity with directions which may from time to time be given by Pitzman's Co. of Surveyors and Engineers, or its successors, as engineers of the party of the second part in charge of the work." It was also stipulated: "If, in making the final estimate it should be found that the average haul is greater than 1400 feet, then the contractor is to be paid three-fourths of one cent per cubic yard for each one hundred feet of average overhaul in excess of said 1400 feet haul. The engineer's opinion as to the increase of haul is to be binding on both contracting parties." The contract also contains this clause: "And when all the work embraced in this contract is fully completed, agreeably to the specifications and stipulations of this agreement, and accepted by the engineer, said engineer shall cause a final estimate to be made of the amount and value of said work, according to the terms and prices of this agreement. From the total amount so found he

shall deduct all sums previously paid or rightfully retained and certify the remainder as then due. Provided, further, that nothing herein contained shall be construed to affect the right of the party of the second part (the defendant) hereby reserved, to reject the whole or any portion of the work aforesaid should the said certificate be found or known to be inconsistent with the terms of this agreement or otherwise improperly given."

It is on those clauses in the contract, particularly the words, "The engineer's opinion as to the increase of haul is to be binding on both contracting parties," that the defendant relies for its contention that the engineer's decision is binding on the plaintiffs, although the overhaul is measured not as it in fact was done, but in a way the engineer thought it might have been done. If we read that clause in connection with the last clause above quoted we have a seeming conflict; in one clause it is said that the engineer's opinion shall be binding on both contract parties, in the other it is not binding on the defendant if the "certificate be found or known to be inconsistent with the terms of this agreement or otherwise improperly given." Does it mean that it is binding on the plaintiffs although it "be found or known to be inconsistent with the terms of this agreement or otherwise improperly given," but not binding on the defendant? By the clause last quoted there are two grounds on which the defendant may dispute the binding effect of the engineer's certificate, first that it is "inconsistent with the terms of this agreement," second, that it was "otherwise improperly given." What does that second ground mean? We can see very well how the defendant might anticipate that its own engineer might make a mistake in his judgment as to the meaning of the contract, but that the defendant should anticipate that its engineer might act "otherwise improperly" in giving the certificate is not so reasonable. Again,

does the preceding clause, which says that the engineer's opinion should be binding on both parties, mean that it shall be binding on the plaintiffs although "inconsistent with the terms of this agreement or otherwise improperly given," yet by force of the latter clause not binding on the defendant? Assuming that these two clauses, taken together, were designed in all fairness and honesty, the reasonable interpretation to be given them is that the opinion of the engineer in matters pertaining to the science of engineering should be binding on both parties, but it was not given him to judge the law of the case, and his certificate would be binding on neither party if it was contrary to the terms of the contract.

There is nothing in *Williams v. Railroad*, 153 Mo. 487, to the contrary of what is here said. In that case the contract was: "The work shall be executed under the direction and supervision of the chief engineer of said railway and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and whose determination shall be conclusive upon the parties, and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be binding and final upon both parties." The court said that that was a valid and binding agreement and that "in the absence of fraud, or gross mistake, as would necessarily imply bad faith, the classification and estimates of the chief engineer and his assistants would be conclusive on both parties." In that case there was a dispute over the classification of material removed and other points relating to the character of the work done. The court said in reference to the engineer's estimate as to the character of certain work done: "At most it can only be held to have been an error in the estimation." There was nothing submitted to the de-

cision of the engineer in that case except matters pertaining to the science of civil engineering. It was not claimed that his decision would be binding if it was contrary to the terms of the contract or that he had authority to pronounce a legal interpretation of the contract. On that point the court in that case said: "Moreover, plaintiffs were entitled to show, if they could, under either count, that the engineer misconstrued the contract in his classification of the loose-rock clause, and had not measured the work according to contract. . . . We think the plaintiffs are correct in their interpretation of this clause, and, if the engineer did so misconstrue it, he exceeded the power vested in him by the contract, and there is no principle of law or equity that demands that plaintiffs should submit to a misconstruction of their contract which would result in serious loss to them. . . . It is the province of the courts to construe contracts, and the plaintiffs had a right to the construction of the courts on this clause." The power given the engineer in that case was more comprehensive than that given in the case at bar, yet the court held that he had no authority to construe the contract.

In *McCormick v. St. Louis*, 166 Mo. 315, the contract sued on contained this clause: "To prevent all disputes and litigation, . . . the water commissioner shall, in all cases, determine the amount of the several kinds of work, which are to be paid for under this contract, and he shall decide all questions which may arise relative to the execution of the contract, on the part of the contractor, and his estimates and decisions shall be final and conclusive." In that case the plaintiff sought to recover for certain work done by him under the contract which was not included in the final estimate, but a divided court held that the final estimate was binding on plaintiff and he could not recover. The case really seems to have turned on the plea of account stated and accord and satisfac-

tion. But the authority given the commissioner in that case was to determine the amount of the several kinds of work which are to be paid for under the contract, and to decide all questions relative to the execution of the contract; he was not given authority to interpret the contract and it was not so contended.

In the case at bar the engineer has undertaken to interpret the contract, and when the contract says that the plaintiffs are to have extra three-fourths of a cent per cubic yard for every 100 feet of average haul over 1400 feet, the engineer says it does not mean the actual overhaul, but it means an overhaul that might have been effected with different means and under a different plan of operation. The work could have been done with spades and horse-scrapers, wagons and teams; it was done with steam shovels, engine and cars, on a railroad track erected by plaintiffs for the purpose. The contract does not specify the appliances to be used; the contractor had the right to decide which was the most economical and expeditious manner of doing the work, he was under a heavy penalty to accomplish the work within a given time. Whilst the engineer testified that the plaintiffs "increased the haul themselves," he does not say or intimate that plaintiffs acted in bad faith in increasing the haul, or that, using the means and appliances that were used, there was any unnecessary increase. He said: "I did not measure it the way they hauled it, because I had never given any direction or consent to hauling it in that way, but simply did not object to it." One of the engineers of the Pitzman Company was on the ground every day supervising and directing the work, Mr. Pitzman himself was there frequently supervising the work, he saw how it was being done and knew the route that was being taken in hauling the material, he was the agent of the defendant to see that the work was done according to the contract, in that respect he was the defendant's vice-principal, Un-

der those circumstances there is no difference between not objecting and consenting.

In a letter to the defendant company touching the point in dispute Mr. Pitzman said: "My entire plan for the work was based on a wagon haul and when the contractors proposed to make the long haul by the use of steam shovel and cars, I changed my plan to accommodate them, but I did not suppose that the company would or could be charged for the excess of haul in consequence of the change of motive power. To my knowledge no order has been given to the contractors during the progress of the work in consequence of which the length of haul has been increased, provided the hauling had been done by teams, but the use of steam shovels and cars did increase the length of haul. If the length of haul is calculated by carrying all the earth used for filling east of the railroad over the bridge built over the Wabash I am satisfied that the average haul would be increased about 500 feet over and above the haul as stated in my final estimate. My superintendent reported weekly the number of teams, men, steam shovels, engines and graders used on the work and I am satisfied from my calculations and estimates that John Scott & Sons after collecting the estimate as submitted will find that their loss on this contract exceeds \$50,000, which fact I regret exceedingly, because they have done first-class work, notwithstanding the fact that they were losing money daily. If John Scott & Sons should insist upon the payment of the estimate made by Mr. Russell and you would decline to pay it, they could appeal to the courts, and what the court or jury would decide is, of course, problematic. All I can say is that I have carefully considered every point and given my unbiased opinion."

The contract says that the engineer's "opinion as to the increase of haul is to be binding on both con-

tracting parties." That means his opinion as to how much the overhaul actually was; but it cannot be said the measurement given in his final estimate was his opinion as to what the overhaul actually was, because he says in his letter, which we have just read, that if the overhaul was calculated by the route it was actually made, "I am satisfied that the average haul would be increased about 500 feet over and above the haul stated in my final estimate." That is his "opinion as to the increase of haul." And his testimony was to the same effect. That is his opinion as an engineer, but in his final estimate he did not confine himself to the science of a civil engineer in which he is an expert, but undertook to construe the contract and construed it to mean that it gave him the power to substitute what might have been for what was. The contract did not make the engineer the umpire to construe it; when the contest arose between the parties to the contract as to its meaning that contest could be settled only in the courts.

So far we have discussed this point from the defendant's testimony alone, but the testimony on the part of the plaintiffs put their case in a stronger light. Their testimony tended to show that the overhaul was along the shortest route practicable; that both before and after the contract was signed they discussed the matter with Mr. Pitzman and explained to him the manner and means they purposed to adopt, and pointed out the general course of the route. Mr. Pitzman located the bridges that plaintiffs had to build for their railroad track to cross the River Des Peres and assisted them in obtaining a crossing over the Colorado railroad. He knew that they were going to do the work mainly with steam shovels, engine and cars; while the work was in progress he told them that the overhaul would be measured as it was actually made; after the work was completed and they came for their final estimate, he told them that he could not cal-

culate the overhaul as it was made, because it would be too much money and the Park View Realty Company would not pay it. There was a good deal of other testimony on the part of the plaintiff on this point but we do not deem it necessary to mention more of it, because enough has been mentioned to show that the plaintiffs made a prima facie case and were entitled to go to the country on the first and third counts of their petition, unless they were precluded by the facts stated in the answer as accord and satisfaction. We do not of course pass on the weight of the evidence, but we do hold that it was not the province of the engineer to interpret the contract and that his estimate based on his legal opinion of the meaning of the contract is not binding on the plaintiffs.

IV. We will now consider the plea of accord and satisfaction.

1. By its amended answer the defendant said that on the first day of February, 1904, the plaintiffs were fully aware of all the facts and conditions they now complain of; they had asserted their claim for the overhaul to the defendant's engineer and to defendant, and had fully discussed the matter; that defendant "in good faith claimed against and to plaintiffs that it was entitled to liquidated damages from plaintiffs as provided in said contract, modifications and supplements, on account of plaintiffs having failed to complete the work agreed by them to be done within the time agreed upon in said contract, modifications and supplements; and plaintiffs and defendants contended concerning said claim of plaintiffs and said claim of defendant;" and that finally on February 1, 1904, defendant "in a spirit of adjustment and compromise tendered to plaintiffs \$76,497.70 in full accord and satisfaction" of all claims, and the plaintiffs accepted the same and gave a receipt in full of all damages.

2. In so far as that plea rests on the alleged claim of liquidated damages for failure to complete the work in the time specified there was no evidence to support it. The contract called for liquidated damages at the rate of \$500 a day if the work was not completed within the time specified, and the statements in the petition show that it was not completed within that time. In the final estimate which Mr. Pitzman submitted to the defendant he said: "The above is subject to our right to claim liquidated damages for delay in completing the work on time. Under the terms of the supplemental contract the work was to have been completed October 1, 1903, whereas they finished the grading December 5, 1903." That communication was addressed and delivered to the defendant company before the alleged settlement was made; it was after several spirited discussions between the plaintiffs and the engineer in his office as to the amount due the plaintiffs, wherein no claim of liquidated damages was made. The matter then came before the board of directors of the defendant when there was again a discussion long and spirited, in which the question was whether the board would pay what the plaintiffs claimed was due them for the actual overhaul or would abide by the engineer's estimate, and they finally resolved that they would pay what the engineer's estimate called for, and no more. The board then, with Mr. Pitzman's estimate before them suggesting that a claim of liquidated damages might be made, made no such claim. Mr. Coffin, one of the board of directors, testified: "At the two meetings of the board referred to, the board always took the position and held to it that they would pay the amount of the estimate of the engineer and no more, and they never offered anything more than that amount. They were willing to pay that, no more and no less. They took the position that they were bound under the contract to pay that amount. There was no compromise offered, it was

just the one thing." Mr. Greenwood, another member of the board, testified: "The members of the board then stated that they felt that they would be justified only in paying what the engineer in charge had certified to and that they would pay and they felt they were bound to pay it, to pay what the engineer had estimated and they were ready and willing to do that and nothing more." The only item in dispute was the item of overhaul, there was no hint of a counterclaim. There were two meetings of the board and every phase of the case was considered; if it was in the mind of any one that the company had a claim, which counsel for defendant in their brief now say amounted to at least \$30,000, is it reasonable to suppose that no mention of it was made? The defendant in the alleged compromise made no concession, waived no claim, they paid only what they admitted to be due as the testimony of their two directors shows and as all the facts show.

The amount shown by the engineer's estimate as due the plaintiffs was \$72,497.70, the amount paid plaintiffs was \$76,497.70, the \$4000 added was an item in previous estimates among orders of plaintiffs supposed to have been paid by defendant for plaintiffs during the progress of the work, but it was discovered that that item had not been paid and therefore it was added to the plaintiffs' balance; there was no dispute about that and that it is not claimed as a disputed point is conceded.

3. Defendant refused to pay what it conceded to be due unless plaintiffs would accept the amount as in full satisfaction of all their claim, plaintiffs yielded to the demand and signed the receipt, and defendant now pleads that that was a fair compromise, accord and satisfaction. Plaintiffs in their reply say that defendant told them that unless they accepted the amount tendered on the terms offered it would pay them nothing and they would have to sue, that the

litigation would last at least three years and by the end of that time the defendant would have disposed of its property and have no means to pay; that plaintiffs investigated the matter and became satisfied that defendant was rapidly placing its property in such condition that they could not collect by law a judgment that might be obtained at the end of a long litigation, and so they accepted the tender and gave the receipt in full; but that afterwards plaintiffs discovered that notwithstanding the articles of association declared that the stock subscriptions had all been paid in full in cash yet that some of the solvent stockholders in defendant corporation had not paid their stock subscriptions in full and the amounts due by them would be sufficient to satisfy plaintiffs' claim, and upon that discovery they brought this suit.

Part payment of a debt is not a discharge of the whole obligation even when the creditor gives a receipt in full. But an exception to that rule is when there is an account between the creditor and debtor sufficiently involved to afford the basis of a fair dispute as to the amount due and after full consideration the creditor yields to the debtor's view and agrees to accept the amount which the latter concedes to be due as in full satisfaction and gives a receipt in full; it comes under the head of account stated and is binding. If therefore it be conceded that there was ground for a fair dispute as to whether the plaintiffs were entitled to pay for their overhaul, estimated on what it actually was, or were entitled only to so much as the engineer estimated it would have been if done differently, and if the plaintiffs finally yielded the point and agreed to settle and did settle on the theory contended for by defendant, and if there was no other moving influence in the case, then the settlement was binding.

But there was another influential fact in this case according to plaintiffs' testimony that forced them to this settlement. After the second session of the board

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of directors and they had pronounced their ultimatum, one of the plaintiffs had a discussion of the subject with the president of the company in which he gave the president to understand that they were going to sue for the amount they claimed to be due, and thereupon the president said it would suit the company just as well to be sued, because if the company should settle then it would have to borrow the money it proposed to pay, whereas a lawsuit would last three years or longer, and in the meantime if the company was successful in disposing of its property it would have enough to pay the whole of plaintiffs' claim or else it would be insolvent and plaintiffs would get nothing. Plaintiffs looked into the matter and were satisfied that the prospect of insolvency of the company foreshadowed by the president was correct and they yielded to defendant's demand and settled, giving a receipt in full.

Ordinarily there is nothing wrong in a debtor, dealing with an honestly disputed balance of account, saying to his creditor, This is all I owe you, but I am not willing to pay it to you and then leave you free to sue me for the balance which you claim; I will pay you this only on condition that you accept the amount in full satisfaction of your claim and receipt for it accordingly. The presumption in such case is that if the creditor is right in his claim the law will give him satisfaction, therefore no wrong is done him, he is free to accept what is offered or go to law with confidence that in the end the law will give him what is right.

But if the debtor should take the occasion to represent to his creditor his financial condition as being such that at the end of the lawsuit there would be nothing to satisfy the judgment, he would thereby introduce an element of coercion in his offer. The offer then instead of being, take this or take what the law will adjudge to be your due, will be equivalent to take

this or you will never get anything. A debtor who refuses to pay what he acknowledges to be due under those circumstances does not deal fairly with his creditor and is not entitled to the advantage so obtained; if he knows that the probabilities are such that a lawsuit would yield his creditor nothing, the only honest course to pursue is to pay what he acknowledges to be due. Respondent relies on the decisions of this court in *Pollman Coal Co. v. St. Louis*, 145 Mo. 651, and *McCormick v. St. Louis*, 166 Mo. 315. In both of those cases the plaintiffs were offered the alternative of taking what the city admitted to be due or going to law for what they claimed; they accepted what was tendered and receipted in full, and sued the city for the balance claimed; the court held the settlement valid and binding. But in those cases the creditor was not dealing with an insolvent debtor or with one representing himself as insolvent, the courts were open to the creditor and there was no doubt of the city's ability to satisfy the judgment. There was no coercion there.

4. Besides there was, according to the plaintiffs' reply and their offer of proof, a concealment of available assets of the corporation by the president in his discussion of the subject with the plaintiffs, perhaps not an intentional concealment, but still a failure to disclose an important fact bearing on the very point then under discussion, that is, the indebtedness of solvent stockholders for their unpaid, or fictitiously paid, stock subscriptions. That was a material fact bearing on the question of fairness of this alleged settlement, and the court erred in rejecting the plaintiffs' evidence offered.

It is argued that because the representations of the president as to the prospective insolvency of the corporation were true, there was no fraud. But this is not a case of obtaining goods under false pretenses; it is the case of a debtor, professedly able then to pay

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what he acknowledged to be due, refusing to pay it, and coercing his creditor to execute a receipt in full by holding up to him the prospective insolvency of his company. If the alleged settlement was coerced under the circumstances which the plaintiffs' testimony tended to prove, it was not a fair settlement and the plaintiffs are not bound by it; whether it was so obtained it is not for this court nor was it for the trial court to say; it was a question for the jury.

The settlement was not a compromise because there was nothing conceded by defendant, it was not an accord and satisfaction because there was no consideration to support it, and it was not a binding settlement if it was obtained under the circumstances above indicated.

The judgment is reversed and the cause remanded to be retried according to the views herein expressed. All concur, except *Woodson, J.*, who concurs in all except paragraph 4 and the result, as to which he dissents.

MARIE DUTCHER v. WABASH RAILROAD
COMPANY, Appellant.

In Banc, March 1, 1912.

- 1 **NEGLIGENCE: Humanitarian Rule: Settled Law.** Although plaintiff was a trespasser and, in full possession of all her faculties, walked for a quarter of a mile on defendant's track without looking behind her for a train, it will not be held she was guilty of such palpable contributory negligence as defeats her recovery as a matter of law, regardless of defendant's own negligence. Even under such circumstances, if those in charge of the locomotive saw her and realized her danger, it became their duty to do what they could, with the means at hand, to avoid injuring her. That is the humanity doctrine, which has become a fixed principle in the law of negligence. That rule is: When one is negligently upon a railroad track,

unconscious of his immediate peril, and that peril is timely discovered by those in charge of the engine, they may not punish him for his negligence by knocking him off, but must use due care to avoid injuring him.

2. ———: ———: **Due Care.** The gauge of due care arises precisely with the obvious danger and the circumstances of the individual case. In one case the monotonous stroke of the bell might be the due care which those in charge of the engine must use to avoid injuring a trespasser on the track; in other cases the alarm whistle timely given might be due care; in an extreme case nothing short of stopping the train would be due care.
3. ———: ———: ———: **Trespassers: Duty to When Seen.** Those in charge of the engine are under no duty to lookout for a trespasser on the railroad track in the country away from congested populations and between public crossings, absent a known and permitted public user; but excepting the duty not to look out for trespassers, the duty to use due care not to kill or maim them if they are seen in time, is precisely the duty owed to those not trespassers.
4. ———: ———: **Alarm Signals: Intervening Confusion.** When a condition intervenes to confuse or prevent a trespasser on the track from hearing an alarm signal, or where the conduct and actions of the trespasser walking on the track with his back to an oncoming locomotive should cause an engineer of ordinary prudence to conclude that such party does not or cannot hear alarm signals, and he continues to walk on the track, the right of the engineer to act upon the presumption that the trespasser will leave the track before being struck ceases.
5. ———: ———: **Duty to See: Applicable to Defendant.** He who shuts his eyes when to open them and look is to see, is presumed to see. And this truism applies to defendant as well as to plaintiff, when due care requires defendant to see.
6. ———: ———: **Duty to Woman on Track.** The engineer of a train is chargeable with the duty to know and realize that the actions of a young woman walking on a railroad track, with her back to him, in the open country between public crossings, her hat in her hand, never looking back and apparently oblivious to danger, unmistakably indicate that she has not heard the crossing signals behind her. It is not natural for a woman to trifle with death by remaining on the track after hearing the alarm signals behind her; and natural instincts constitute evidence to men of sense.

7. ———: ———: ———: Noise from Train on Near-by Track. On parallel railroads, 100 feet apart, two freight trains were moving in opposite directions. The one on defendant's road was running extra, was 510 feet long, made up of twelve loaded freight cars, the rear four of which were non-air cars, but the other eight and the engine well equipped with air, and the train was running from twenty-five to thirty miles an hour, on an upgrade of twenty-seven feet to the mile, on a track that lay on a fill. The other train consisted of twenty-five freight cars, was over 1000 feet long, running about twenty miles an hour on a slightly down grade, and made a great deal of noise. Plaintiff, a school teacher, nineteen years of age, in full possession of all her faculties, about 4:30 in the afternoon of September 6th, accompanied by a girl of ten years, left the public road at a crossing and walked north on defendant's track, and at about one-quarter of a mile from the crossing was struck by defendant's train which approached from the south. The afternoon was clear, bright and warm, and plaintiff, bareheaded and carrying a lunch satchel and a box of wild haws, faced steadily to the north, and neither she nor the child at any time looked back or in any wise indicated a knowledge that a train was approaching from behind. At the time the defendant's train struck her the caboose of the other train was just opposite or had passed her 100 feet or so. The tracks were straight, unobstructed, and when defendant's train was a mile or a mile and a half from plaintiff and the child, the engineer saw them going north on the track, with their backs to him, and thereafter kept them under his eye, and also saw the train on the opposite track coming to meet his and that the trains would meet each other just about the time his train would overtake her. He sounded the signal at the crossing, which she did not seem to hear. According to his testimony when he was 600 or 700 feet from her, and according to other testimony when he was 180 to 200 feet behind her, he simultaneously began to sound the alarm signals and turned on the full force of the emergency air, but she at no time heard the train and did not know until after she had regained consciousness what had struck her. The train stopped after striking her, and its south end was sixty-eight feet north of the point of the accident, that is, the train ran 578 feet beyond that point, though some witnesses say the distance was eleven or twelve hundred feet. There was testimony that it could have been stopped in 300 or 400 feet, if it was then running at the rate the defendant's witnesses testified it was. The men on the train on the parallel road saw plaintiff's peril and did their best to draw her attention, by shouting and motioning, to the defendant's train bearing down upon her; but she supposed they were flirting with her, and at no time turned her head to look back. It is ad-

mitted that the train could not have been stopped after the alarm signals were first given before striking her. *Held*, first, that a demurrer to the evidence should not have been sustained; second, whether or not the act of the engineer, with everything to be seen lying right under his eye, in allowing the situation to drift and delaying to attempt to stop the train until the near approach and noise of the train on the other track made it a matter of doubt whether or not the alarm signals would reach her and be effective, was the exercise of due care to avoid striking her, was a question for the jury, and their verdict holding his act to be negligent cannot be disturbed by the appellate court; and, third, there being a conflict in the testimony as to whether the train was 700 or 180 feet from her when the alarm signals were first sounded and the air brakes applied, that testimony also raised a question of diligence and care as to the time of giving the signals, which was for the jury.

Held, by WOODSON, J., dissenting, first, that there was no substantial testimony to contradict that of numerous witnesses that the danger signals were repeatedly given in ample time for plaintiff to have stepped from the track before being struck; second, that plaintiff unquestionably heard the danger signals, and that the engineer had the right to presume that plaintiff heard the signals and would step out of the danger line until he had reasonable ground to apprehend that she was ignorant of the train's approach and had not heard the signals; third, that plaintiff was guilty of the grossest negligence, which continued down to the place and instant of her injury, and therefore the humanitarian doctrine does not apply to the case, since the rule is that, if the negligence of plaintiff continues down to the time of the accident that doctrine has no application; fourth, since the engineer had a right to presume that plaintiff would heed the alarm signals which she heard or could have heard had she not been negligent in not trying to hear, and since it was impossible to have stopped the train before striking her after the signals were given, defendant is not to be held to have failed to exercise ordinary care in not sooner attempting to stop the train; and, fifth, even though it be conceded that defendant was guilty of negligence in not sooner stopping the train, yet as her own negligence continued down to the very instant she was struck, the concurrent negligence of both should bar her recovery.

8. **APPELLATE PRACTICE: Weight of Testimony: Matter for Jury.** The Supreme Court has nothing to do with the weight of testimony in a law case. Its function is to say whether there was any substantial testimony. It will not uphold a

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verdict supported by only a mere glimmer or spark, a mere *scintilla*, of testimony;— but if there is substantial testimony, however small as compared with the great body of proof, the appellate court has no right to meddle with the weight of it, or ignore it because negative in character.

9. ———: ———: ———: **Negative Testimony: New Trial.** Nor can the Supreme Court reverse a verdict for plaintiff though it rest alone upon testimony negative in character, if that testimony is substantial. Where the nineteen-year-old plaintiff was bareheaded and had good ears, yet neither she nor the ten-year-old child with her heard any alarm signal from the train approaching from behind, the appellate court will not say that the signals were sounded though several other witnesses, both interested and disinterested, positively testify they were sounded. The trial court, under such circumstances, might properly grant a new trial to defendant on the ground that the verdict was against the great weight of the credible testimony; but that negative testimony was substantial, and in the face of it the appellate court has no right to reverse a verdict for plaintiff, even if the failure to sound the alarm signals were the only issue of negligence in the case.
10. **NEGLIGENCE: Pedestrian on Track: Failure to Stop Train: Depending on Alarm Signals: Confusion of Noises.** A railroad engineer does not use due diligence in applying the emergency brakes, if a large train is passing on a near-by parallel track, making so much noise that the sounding of the alarm signals is drowned in its volume, and, depending on those signals to draw the attention of a trespasser on the track, he waits to apply the emergency brakes until it becomes impossible with the means at hand to stop the train before striking her. His duty, under such circumstances, is to stop before hitting her. And under the circumstances of this case the engineer knew or was bound to know, which amounts to the same thing, that he could not stop his train after he first applied his brakes before striking plaintiff.
11. ———: ———: **Instruction: Reliance on Rumbling of Train to Give Notice.** An instruction telling the jury that no warning signals were necessary until the engineer discovered that the trespasser on the track, within the sound zone of a much greater train on a near-by track, did not hear the rumbling of his train, was properly refused.
12. ———: ———: **Not Looking.** An instruction which precludes a recovery by the trespasser because she walked leisurely down the track without turning her head, and this although the jury believe "no signal was given nor effort made to stop the train," should be refused. It is not the law of a case falling within the humanitarian doctrine.

13. ———: ———: ———: **Due Care: What is Stopping and Signal Distance.** An instruction declaring that an alarm signal at 600 feet from the pedestrian on the track was due care, and that the engineer was not required to stop the train when he came in stopping distance of her, was, under the circumstances of this case, properly refused. And so also was another instruction declaring as a matter of law that if the alarm signals and attempts to stop the train began 600 feet from plaintiff and continued until she was struck she could not recover, properly refused, for it invaded the right of the jury to determine what was due care under the peculiar circumstances of this case.
14. ———: ———: ———: **Noise of Another Train: Not Looking Behind.** An instruction telling the jury that it was the imperative duty of the pedestrian on the track, because of the great noise made by a train passing in the opposite direction on a near-by track, to look behind to see if the train that struck her was approaching, and if she failed in that duty she could not recover, was properly refused. In effect, it was a mandatory instruction for defendant.
15. ———: ———: ———: **Wantonness: Humanity Rule.** The court should not tell the jury in a case resting on the humanitarian rule that the railroad company owed no duty to a pedestrian walking on its track except to not willfully or wantonly injure her. The willfulness and wantonness doctrine is exploded. The touchstone of duty in the law of negligence is due care, not a shade less or more.
16. ———: ———: ———: **Alarm Signals Not Heard for Noises.** An instruction based on the theory that if the alarm signals were timely given but could not be heard because of the noises made by a train on another near-by track, the pedestrian could not recover for injuries received by being run down by the train, is not the law of a case resting on the humanitarian doctrine. Due care does not, because of the noises, exclude the duty to stop the train in time to avoid the injury.
17. ———: ———: ———: **Limiting Distance for Signals.** An instruction declaring the law to be that if the whistle was blown from three to six hundred feet from plaintiff as she walked on the defendant's railroad track with her back to the approaching train, and afterwards until she was struck, and the engineer did all in his power to save her after discovering she did not get off the track to avoid her own injury, then the verdict must be for defendant, under the circumstances of this case invaded the province of the jury, by limiting the distance in which the engineer was obliged to begin an effort

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to warn and save plaintiff to within three to six hundred feet, and therefore was properly refused.

18. ———: **Pleading: Noises of Another Train: Proof.** The noises of a train on another near-by track, and the fact that any experienced person observing that train going in one direction and the one which struck defendant going in the other could see that the two would pass about the place plaintiff was struck, are evidential matters, and proof of them may be made under a charge of a failure to use due care, without pleading them as specifications of negligence.
19. ———: **Trespasser: Instruction: No Duty Except to Sound Alarm.** An instruction which excludes any duty of the engineer to a trespasser to stop the train under any circumstances is bad; and a modification by inserting the words "in the first instance" in the clause declaring that "the defendant owed to her no duty, in the first instance except to warn her by the usual signals of the approach of the train in time for her to step off the track and avoid being struck," was more favorable to defendant than it was entitled to, since under the testimony the situation demanded the instantaneous application of the air brakes with the blowing of the whistle.
20. ———: **Excessive Verdict: \$10,000.** Plaintiff, nineteen years old, a school teacher, while walking on a railroad track, was struck by a train. She was taken up unconscious, remained unconscious for days, was injured on her head, an arm and leg were broken, she was disfigured, one of her feet and the toes of that foot are drawn out of place, making her club-footed and lame, one arm is crooked and there is a catch in the elbow of it, and she is a cripple for life. *Held*, that a verdict for \$10,000 is not excessive.
21. **REMARKS OF COUNSEL: Reasonable Verdict, etc.** The straying by plaintiff's counsel in the heat of argument a little out of the record, for which he was admonished by the court, in a case which is not a close one, in which the size of the verdict does not show inflamed minds in the jurors, will not justify a reversal or a new trial.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton*, Judge.

AFFIRMED.

James L. Minnis and Higbee & Mills for appellant.

1. The court erred in overruling defendant's demurrer at the close of all the evidence. a. It was admitted by plaintiff's counsel on the trial that defendant's track was inclosed by lawful fences and cattle-guards; there was no evidence tending to prove that the track was used by pedestrians as a public highway; or that defendant acquiesced in occasional use of it by pedestrians; the court so found and declared by defendant's instruction 13, and that plaintiff was a trespasser by defendant's instruction 14. No exceptions were saved thereto; plaintiff agreed to the correctness of both instructions. *Eppstein v. Railroad*, 197 Mo. 720; *Frye v. Railroad*, 200 Mo. 402; *Hyde v. Railroad*, 110 Mo. 272; 2 *Thomp. Neg.*, sec. 1705. b. The petition charges that defendant's servants in charge of the train negligently failed to warn plaintiff of the approach of the engine, or to sound the whistle or ring the bell at any time within one-fourth mile of her, or to use ordinary care to stop the train. These are the specific allegations of negligence, and are alleged to have been the cause of plaintiff's injury. There was a total failure of proof of these allegations, and the case should have been withdrawn from the jury. *McManamee v. Railroad*, 135 Mo. 440. Collins, the peddler, plaintiff's witness, testified danger signals were given until plaintiff was struck, but he did not know which engine gave them; the Katy train passed between him and the Wabash train, and he had no opportunity to observe when the train began checking its speed; his evidence on that point was without probative value. *Bennett v. Railroad*, 122 Mo. App. 703. c. The evidence was conclusive that plaintiff was guilty of gross negligence continuing down to the time of the accident; that she knew she was walking on defendant's main track; that it was broad day-

light, the view unobstructed, and she at no time looked behind her or listened for the approach of a train. She was not only apparently, but in fact, in possession of all her faculties. The engineer had no reason to believe she would not hear the alarms and was not bound to anticipate she would not step aside. Her negligence, according to her own testimony, was unaccountably gross; was subsequent to the alleged negligence of defendant's engineer, continued down to the time of the accident, and was the proximate cause thereof. She had the last clear chance to avoid the injury. 23 Am. & Eng. Ency. Law (2 Ed.), 761, 765; 1 Thomp. Neg. 235-241; Bogan v. Railroad, 129 N. C. 154; 3 Elliott on Railroads, secs. 1253, 1254, 1257a; Davies v. Mann, 10 M. & W. 546; Drown v. Traction Co. (Ohio), 10 L. R. A. (N. S.) 421; Dyerson v. Railroad (Kan.), 7 L. R. A. (N. S.) 132, and annotations; Modiwell v. Railroad, 151 Fed. 421; Neal v. Railroad, 49 L. R. A. 684; Hoffard v. Railroad, 110 N. W. 446; Copp v. Railroad, 100 Me. 568; Williams v. Railroad, 40 So. (Ga.) 143; Finlayson v. Railroad, 1 Dill. 578; Holmes v. Railroad, 97 Cal. 161; Railroad v. Graham, 46 Ind. 239; Railroad v. McClaren, 62 Ind. 566; Railroad v. Walker, 113 Ind. 196; Campbell v. Railroad, 55 Kan. 536; Syme v. Railroad, 113 N. C. 558; Railroad v. Cook, 42 Neb. 905; Herring v. Railroad, 32 N. C. 402; McAdoo v. Railroad, 105 N. C. 140; Daily v. Railroad, 106 N. C. 301; Norwood v. Railroad, 111 N. C. 236; Cogswell v. Railroad, 6 Ore. 417; Tyler v. Sites, 90 Va. 539; Railroad v. Judd, 10 Ind. App. 213. (d) It was plaintiff's duty to have given attention, heard the signals and left the track. It was her misfortune if she was so absorbed she failed to take notice of the repeated warnings. By subsequently continuing to walk on the track until she was struck she was guilty of such contributory negligence as to defeat her recovery in this cause. Her negligence was the prox-

mate cause of her injury, although the engineer might have been negligent in not stopping the train in time to avoid the collision. *Yarnall v. Railroad*, 75 Mo. 575; *Sinclair v. Railroad*, 133 Mo. 233; *Prewitt v. Eddy*, 115 Mo. 283; *Woods v. Railroad*, 188 Mo. 229; *Candee v. Railroad*, 130 Mo. 142; *Bell v. Railroad*, 72 Mo. 50; *Maloy v. Railroad*, 84 Mo. 275; *Sharp v. Railroad*, 161 Mo. 214; *Tanner v. Railroad*, 161 Mo. 497; *Barker v. Railroad*, 98 Mo. 50; *Powell v. Railroad*, 76 Mo. 80; *Everett v. Railroad*, 214 Mo. 54; *Dlauhi v. Railroad*, 105 Mo. 645; *McGauley v. Railroad*, 179 Mo. 583; *Brockschmidt v. Railroad*, 205 Mo. 435; *Cahill v. Railroad*, 205 Mo. 393; *Laun v. Railroad*, 216 Mo. 563; *Zumault v. Railroad*, 175 Mo. 288; *Ross v. Railroad*, 132 Mo. App. 472; *Sims v. Railroad*, 116 Mo. App. 572; *Bennett v. Railroad*, 122 Mo. App. 703; *Reyburn v. Railroad*, 187 Mo. 565; *Engelking v. Railroad*, 187 Mo. 158; *Schmidt v. Railroad*, 191 Mo. 215; *Eppstein v. Railroad*, 197 Mo. 720; *Stotler v. Railroad*, 204 Mo. 619; *Sissell v. Railroad*, 214 Mo. 515; *Holland v. Railroad*, 210 Mo. 338; *Davies v. Railroad*, 159 Mo. 1; *McGee v. Railroad*, 214 Mo. 530; *Kinlen v. Railroad*, 216 Mo. 145; *Felver v. Railroad*, 216 Mo. 195. (2) The doctrine of the last clear chance means a clear opportunity, and not a mere possibility. The court submitted the case upon mere estimates or guesses of distances, speed of the train, formed under the excitement of the impending catastrophe, and of the distance within which the train could have been stopped. The fact remains that danger signals were given, the full force of the brake power applied, the track sanded, and the bell rung continually for a distance of near 600 feet before plaintiff was struck, and the train did not stop in time to save plaintiff, and every one but herself was exhausting his utmost efforts to avoid the collision. It cannot be said there is any evidence of such gross negligence or reckless or wanton conduct as justified the court in submitting to the jury to say

whether or not the plaintiff ought to recover in spite of her own negligence. It requires more than a showing of a mere possibility that the accident might have been avoided in order to bring a case within the humanitarian doctrine. *Markowitz v. Railroad*, 186 Mo. 350; *Boring v. Railroad*, 194 Mo. 541; *Neal v. Railroad*, 126 N. C. 634.

Sanford B. Ladd, F. M. Harrington and Campbell & Ellison for respondent.

(1) Although plaintiff was negligent and a trespasser, this fact will not bar her recovery, because it stands admitted defendant's operatives saw her in ample time to stop the train. *Morgan v. Railroad*, 159 Mo. 262; *Eppstein v. Railroad*, 197 Mo. 720. In fact in cases based on the humanitarian rule the negligence of the plaintiff is confessed. *Hall v. Railroad*, 219 Mo. 553; *Everett v. Railroad*, 214 Mo. 54. (2) Defendant presents a demurrer at the close of plaintiff's case and again at the close of all the evidence. The whole evidence is before the court. "It is elementary in this State that a demurrer admits every fact to be true which the evidence in the case tends to prove, whether by direct testimony or by reasonable deductions to be drawn therefrom." *Von Trebra v. Railroad*, 209 Mo. 658. (3) It is claimed by appellant that plaintiff's evidence that she did not hear alarms is of no probative force, and does not tend to prove alarms were not sounded. There might be force in this contention if alarm signals were ordinary noises and if other circumstances existing in this case were not also proven. But alarm signals from an engine are startling noises and are heard for miles. It is impossible for us to conceive of persons being so absorbed they would not hear such signals sounded within a few hundred feet of them. Plaintiff is not the only one who did not hear. The little, timid, nine-year-old child

that walked on the ends of the ties and who escaped so narrowly that even the fireman and brakeman on the Wabash train told the conductor that she, too, had been struck, evidently did not hear any alarms. Her conduct in remaining on the track is a mute but convincing witness that she did not hear. That little girl had not reached the age to be "mentally absorbed." The passing train on the M., K. & T. track was only sufficient to prevent her hearing the ordinary noises of the approaching Wabash train. If alarm signals had been sounded continuously for six hundred feet before it reached her, as appellant contends, she, as well as plaintiff, would undoubtedly have heard. There would have been near fifty short, sharp, startling shrieks in that six hundred feet and almost one-half minute would have been required by the train in traveling the distance. That they did not hear such extraordinary noises is strong evidence there were no such noises. Even plaintiff's evidence that she did not hear is of itself sufficient to submit the question of alarms or no alarms to the jury. *Murray v. Company*, 101 Mo. 242; *Hanlon v. Company*, 104 Mo. 388; *State v. Company*, 70 Mo. App. 641. (4) The defendant's answer avers that defendant failed to stop, look or listen for the approach of defendant's said cars; that as soon as her presence on said track was discovered by defendant's employees so managing and operating said train, she was duly warned of the approach by said train by blowing the whistle and ringing the bell. Said averment is, as a matter of law, a confession on the part of defendant that plaintiff was in peril at all times while on said track. *Lynch v. Railroad*, 208 Mo. 24. There is no claim in the answer that any efforts whatever were made by said operatives to stop or check the train; on the contrary, it proceeds upon the theory that the only duty defendants operatives ever owed plaintiff was to sound the whistle. The question as to when the defendant did or

ought to have discovered plaintiff's peril is well stated in *Becker v. Company*, 53 L. R. A. 270.

LAMM, J.—Negligence. Defendant in apt time and due form appeals from a judgment in the Adair Circuit Court entered on a verdict in plaintiff's favor for \$10,000.

The pleadings. As we construe the petition it counts on the three specifications of negligence following:

First, that plaintiff was walking on defendant's track in Randolph county south of the city of Moberly at a point where said track (with the knowledge of defendant and its officers, servants and employees) was for a long time treated as a thoroughfare by people not connected with the railroad service and by them was traveled as a public highway of said county. That such public user cast the duty upon defendant's employees running its trains to keep a sharp lookout for persons on the track in front of them and exposed to danger. That on the occasion in hand defendant's employees running a certain locomotive and train of cars failed to perform this duty, when by ordinary care in looking out they would have discovered plaintiff's peril in time to have saved her. (*Nota bene*: This specification was not submitted to the jury.)

Second, complaint is made in the petition of a negligent rate of speed of forty miles an hour in violation of defendant's alleged duty to run its trains at the *locus in quo* at such speed as permitted the engineer to have his train "constantly under control." (*Nota bene*: This specification also was not submitted to the jury.)

Third, finally the petition counts on another theory, viz., that, plaintiff being on the track and unconscious of the train's approach, defendant's servants in immediate charge of its locomotive and train saw her danger in ample time to have warned her and to

have stopped the train before running her down and negligently failed to do either, whereby she was run down, struck and injured. (Note. This was the issue put to the jury upon which to predicate a recovery.)

The answer admits defendant was a railroad corporation owning and operating the line of railroad mentioned, but denies all other allegations. Following that denial is a plea of contributory negligence—in that, the place of the accident was in the country among farms, where defendant's track was inclosed by side fences and cattle-guards and was not at the crossing at any public road; that plaintiff, without the knowledge or consent of defendant or its employees managing its train, negligently got upon its track as a trespasser and, walking thereon, negligently failed to stop, look or listen for the train. That as soon as she was seen on the track by defendant's said servants she was duly warned by both whistle and bell, notwithstanding which warnings she failed to leave the track as she had plenty of time to do. That if she had stopped, looked or listened she would have seen and heard the train in ample time to leave the track and avoid her own injury; wherefore, defendant avers that plaintiff's hurts were caused by her own negligent, unlawful and careless conduct. While, as said, defendant, in its answer pleaded affirmatively that due care was exercised in giving warnings by signals, there is no affirmative plea of any attempt to stop before hitting plaintiff. The issue in that behalf was raised by the general denial.

The cause was argued twice at our bar—once in Division and once in Banc. The force of the oral arguments by learned counsel on both sides was spent on the alleged error of the ruling *nisi* disallowing a demurrer to the evidence at the close of the whole case. So, error in that ruling is pressed with vigor as the main assignment in defendant's brief.

There are other assignments, viz.:

The court erred (1) in giving plaintiff's first and second instructions; (2) in refusing eleven instructions prayed by defendant; (3) in permitting evidence tending to prove that plaintiff's attention was attracted by the noise of an M. K. & T. train running nearby on a parallel track; (4) in modifying defendant's 15th instruction; (5) in overruling defendant's timely objection to the inflammatory argument of plaintiff's counsel and in failing to rebuke counsel; and (6) finally that the verdict was against the instructions, was excessive and the product of sympathy, prejudice and passion.

Attending to those assignments, the main one seeks the facts, which are, to-wit: -

It is not amiss to cull, as near as may be, the undisputed from the disputed facts. Those undisputed follow, viz.: The scene of the accident was a mile or so south of the town of Moberly. Close by its south corporation line the Missouri, Kansas and Texas crosses the Wabash. Thence south for two or three miles the tracks of both run on a tangent and parallel 100 feet apart, the Wabash to the east, and the rights of way of both are inclosed by the same side fences and cut off by cattle-guards at public crossings.

Going north into Moberly there is an up grade of twenty-seven feet to the mile at the place of the accident, but the view on and of each track is quite unobstructed for a mile and a half or more either way from that place. At that point the Wabash track lay on a fill.

Some two or three hundred feet north of that place an east-and-west public road cuts both railroad tracks at a right angle, making what is called the Headinghouse crossing. About one-half mile south of the Headinghouse crossing there was another east-and west public road making what is called the Terrill crossing.

There was a school house at a cross-road corner west of the Terrill crossing. Miss Dutcher began teaching school in that country schoolhouse four days before she was injured, to-wit, on the 6th day of September, 1906. She boarded with her brother, who lived on a farm northeast of the Headinghouse crossing on a north-and-south public road. She could go home from school by public roads in two ways. First, she could turn north at the corner at the schoolhouse on a public road and after aways turn east and go on over the Headinghouse crossing, and thence on east until she came to the north-and-south road on which her brother lived, and thence north on that road home; or she could go straight east from her schoolhouse on the Terrill road, cross both tracks at the Terrill crossing, thence on east till she came to the road on which her brother lived, thence turn north home, missing the Headinghouse crossing altogether.

She took neither of these ways home on the day she was hurt, nor had she taken either in the four days of her school term. She went (as she always had gone) east on the Terrill road until she came to or close to the Terrill crossing and then she turned north taking the M. K. & T. track for it. Presently, for personal reasons immaterial here, she changed over from the M. K. & T. to the Wabash and traveled north on the latter's track for, say, a quarter of a mile, heading toward the Headinghouse crossing, where she planned to turn east until she came to the road on which her brother lived. It was about 4:30 of a clear, warm, bright summer afternoon. Taking with her a pupil, a little girl of ten years, she (herself aged nineteen) walked north in the middle of the track, bare-headed, carrying a lunch satchel and a box of wild haws, and being at the time in full possession of perfect natural senses. It seems the child walked a trifle ahead and to one side outside the rail on the ties, but within the danger line. The testimony is that after

starting north neither of them turned their heads to look for a train from the south, but faced steadily to the north. However, when Miss Dutcher first got upon the Wabash track she looked to the south, but no train was then in sight.

A few minutes before the accident, a train on one track was approaching one running on the other. On the M. K. & T. track there was a heavy freight train of 1000 or more feet in length, made up of twenty-five loaded cars, running down grade to the south at, say, 20 miles per hour and making a great deal of noise. On the Wabash track there was a train of, say, 510 feet in length, made up of twelve loaded freight cars, running extra, approaching her from the south at a speed of from twenty-five to thirty miles per hour. The eight forward cars of this train and the engine were well equipped with air—the last four, including the caboose, were non-air cars.

When a mile or a mile and a half away (and constantly thereafter until he struck her) the engineer of the Wabash train saw the school mistress and little child going north on the track ahead of him, with their backs to him, and kept them under his eye. He also saw the M. K. & T. train coming to meet his. A man of experience, such as the Wabash engineer was, could well conclude, as appears from the testimony, that at the rate the two trains were running the Wabash train would catch up with the school mistress at the very time the M. K. & T. train would pass her only 100 feet to her left. This would become more and more obvious as the trains covered the distance between them. That was precisely what happened. At two or three hundred feet south of the Headinghouse crossing, when the caboose of the M. K. & T. train was passing her or had got by her a hundred feet or so, the locomotive of the Wabash train struck her and tossed her many feet up and to one side off the track.

The child was not injured—the record being dark on the reason why.

It does not appear which way the wind, if any, blew and train sounds carried. Although bareheaded and in possession of all her natural senses, as said, Miss Dutcher did not hear the train that struck her nor did she know what struck her, and the evidence of the several eye witnesses is to the effect that as that train approached her from behind she walked straight on in the middle of the track, giving not the least sign she was aware of its approach, but to the contrary showing by her carriage and conduct that she was entirely oblivious to its presence.

She was taken up unconscious, remained unconscious for days, was injured on her head, an arm and leg were broken and possibly both arms, she was disfigured, one of her feet and the toes of that foot are drawn out of place, making her clubfooted and lame, one arm is crooked, there is a catch in the elbow of it, and there are other serious injuries—in short she is a cripple for life.

The M. K. & T. train was, as said, over 1000 feet long. As the men on the engine of that train approached her they saw her and apprehended her ignorance of danger and imminent peril and did their best to attract her attention to the Wabash train bearing down upon her from behind by shouting and motioning. At the same time at the rear of the M. K. & T. train the men on the caboose also saw her peril and that she was unaware of it and also tried to warn her by shouting and gesticulating until they passed her. She saw this train and the motions of these men but, misapprehending their meaning, she thought they were trying to flirt with her and went her way in the middle of the track with her face, as always before, set to the north.

There was a whistling post eighty rods south of the Headinghouse crossing. All sides agree that the

Wabash engine gave the usual crossing signal at that post. I am of opinion that the fact, or if not the fact, at least the time and extent of the alarm signals, if any, belong in the list of disputed or uncertain facts to be stated later on.

We shall assume it proved beyond question that at the instant the school mistress was struck the Wabash engine had slowed down some—the extent thereof and the time and character of attempts to stop belong also in the category of disputed or uncertain facts to be noticed later on. After she was struck the Wabash train stopped, but before stopping it ran so far that its caboose stood about two carlengths (say sixty-eight feet) north of where her body lay in the ditch. That is, it ran its own length (about five hundred and ten feet) plus sixty-eight feet. She was struck about 300 feet south of the Headinghouse crossing. The day was warm, as said, and the windows of the Wabash caboose and of its cupola were open. A brakeman, in order to make a quick switch at Moberly, had gone forward over the Wabash engine to the cowcatcher. He shouted to the school mistress as the engine came on, and, seeing she was unconscious of the warning and that the engine was bound to strike her, he left his post and came back over the engine before that event.

All the testimony tends to show that plaintiff was a trespasser on the Wabash track and that the sporadic occasional use of the track by footmen did not establish any public right by custom, acquiesced in, to such user at the time and place.

It maybe taken as established, also, that when the air brakes were once applied the jar of the air going on would be felt immediately in the non-air cars at the tail of the train. Moreover that, speed and track both considered, it was impossible to stop after the air was actually applied before hitting plaintiff, leaving the

question open for the nonce whether the application of the air was negligently delayed.

We now come to a set of facts which are uncertain or disputed, or from which different inferences are drawn by counsel. As the summary we are making relates to defendant's demurrer to the evidence, we shall deal with the disputed and uncertain facts in a way as favorable to plaintiff as the record will allow—laying to one side, as within the province of the jury, both self-contradictions of, and disagreements between, witnesses; and giving our impressions of the tendency of the proof based on a critical study of the record, rather than swell the statement by profusion of detail.

There is some evidence to the effect that a rain had lately fallen and the public roads were heavy, and much that there was a dry spell and those roads were dusty; but, as this testimony connects itself merely with the use of the track by pedestrians, we lay it out of view on the same shelf with the user itself.

By far the greater weight of the testimony tends to show that alarm signals were given by the Wabash engineer before the school mistress was struck. Some of it indicates they commenced at once after the crossing signal at the whistling post, say, 800 or more feet away from plaintiff. Some of it is to the effect that these signals commenced subsequently when the Wabash engine was 600 feet south of plaintiff. The engineer so testified. His account is that, noticing that the school mistress and the little girl did not look around when he gave the crossing signal, he drove ahead until within about 600 feet of where plaintiff was struck, when he began giving danger signals and continued them until she was struck. She was, as already said, always under his eye and he saw she gave no indications that she heard the signals or the train but just walked on in a leisurely sort of gait. But there was other testimony from some of defendant's

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witnesses who were watching the train, the school mistress and little girl, which is fairly susceptible to the construction that the alarm signals were first given when the engine was about one hundred and eighty or two hundred feet from the school mistress. There was an eye witness (Collins) on the M. K. & T. track 175 feet north of the Headinghouse crossing who left the track to let that train pass. There is some uncertainty whether he left to the east or to the west. If to the west, then the M. K. & T. train passed between him and the scene of the accident and shut off his view for the time. If to the east, then he was in plain view all the time. However, when the M. K. & T. passed him he could see what happened. He testified that the sharp alarm blasts were given after the M. K. & T. train passed him (but by which train he did not know) and he must have stood about four hundred feet from the point where she was struck.

There was negative evidence of some appreciable value. For instance, as pointed out, the school mistress was bareheaded and had good ears and she heard no alarm signals at all from the Wabash train. A silent fact of some value is that the child seems to have heard no alarm signals either. So, the Wabash conductor who was 510 feet from the nose of the engine of his train and was in a caboose with open windows, says he heard no alarm whistling until a while after he felt the jar and jam of his train from the air going on. A brakeman, in the cupola and similarly situated, gave evidence to the same effect. There was some testimony that the alarm signals continued after she was struck and one witness who was watching (Collins) says he saw no steam escape from the Wabash whistle.

Another witness testified the alarm signals were given after the M. K. & T. train passed south over the Headinghouse crossing. On that hypothesis they were given much less than 600 feet from her. So much for

the fact of alarm signals and the time they were given.

What of attempts, if any, to stop the train and when were they made? The engineer says that, *simultaneously* with giving the alarm signals when 600 feet away from the plaintiff, he turned on the full force of his air and that his efforts to stop resulted in lowering his speed to about sixteen or eighteen miles per hour. Other testimony cuts the speed down to from ten to fifteen miles per hour at the moment of impact. Some of the testimony tended to show that the emergency air was turned on *before* and some of it *after* the alarm signals were first given, and some of it, not agreeing to the distance mentioned by the engineer, tended to show (as he testified) that the air went on at the same time the alarm signals were given. There was also testimony tending to show that the train ran after the emergency was applied eleven or twelve hundred feet and that the stop was a good one (this from the engineer and others), but there was other testimony tending to show that the train only ran from 600 to 800 feet after the emergency air went on. Assuming the train was running at the time it struck her at twelve to sixteen miles per hour, there was testimony tending to show that at twelve miles per hour, it could stop in 300 feet and at sixteen miles in 400 feet. In point of fact it ran after the blow about 600 feet. The witness Collins testified there was no slackening of speed at all until after Miss Dutcher was struck.

If necessity arises other facts will be stated in connection with the disposition of the assignments of error *seriatim*.

I. When this case was argued in Division, the three sitting brethren were at first of opinion the demurrer to the evidence was improvidently ruled. But a restudy of the record, aided by arguments in Banc and new briefs, warrants a holding that the demurrer was well ruled. This because:

(a) Defendant's counsel industriously (and *ex industria*) have marshaled a great array of authority which we take as intended to explode the humanity rule as broadly expounded and adhered to in this jurisdiction. Thus, based on the theory that plaintiff was a trespasser and walked for a quarter of a mile on defendant's track without looking behind her for a train, it is contended she was guilty of such palpable contributory negligence as defeats recovery *as a matter of law*, regardless of defendant's own negligence. But we will not be drawn into an extended exposition of the philosophy of the humanity rule nor into a fresh defence of it.

In *Reyburn v. Railroad*, 187 Mo. l. c. 574, we said: "If what this court has said in former cases has failed to reconcile appellant to the justness of this doctrine probably nothing we could now say would be more persuasive." That language was addressed to an attack made upon the humanity rule as laid down in the same case in these words (pp. 573-4): "It has long been the doctrine of this court that though a man voluntarily adopts the dangerous track of a railroad for his footpath and walks in it apparently heedless of the danger entailed, yet if the servants in charge of the locomotive see him and realize his danger, . . . it then becomes their duty to exercise ordinary care to do what they can with the means then at hand to avoid injuring him, and if they fail in that duty the railroad company is liable, notwithstanding the negligence of the injured man."

In the *Murphy* case (228 Mo. 56) an elaborate and animated assault—one of many before—was delivered in Banc on the rule. In response we said, *inter alia* (p. 80): "In the light of our later decisions, holding a single and no uncertain voice in that behalf, to defend the rule by marshaling anew the reasons underlying it, is but to admit it needs defense, and we leave it with some observations, viz.: (1) It is

too firmly rooted in the jurisprudence of this State to be overturned by anything short of an act of the law-making power."

In Banc in the Eppstein case, 197 Mo. l. c. 733, certain propositions pertaining to the humanity doctrine were formulated. Two of them are: "(a) Where one (at least one *sui juris*) is in a place of safety and therefrom negligently moves to a place of danger, so immediately before that danger that it may not be averted by the use of ordinary care by those controlling the dangerous instrumentality, and is killed, his death is not actionable. (b) Where one, unconscious of his peril, has negligently placed himself in a position of danger so far away from that danger that his death may be averted by the use of ordinary care by those who see him and who control the dangerous instrumentality, his death is actionable."

In peril oft may be, yet so stands today the rule of law administered by appellate courts of Missouri in negligence cases coming within the range of the rule. *Stare decisis. Quia non movere.* Accordingly the demurrer to the evidence cannot stand on the unsoundness of the humanitarian doctrine.

(b) A locomotive engine is equipped with whistle, bell and ability to stop its train. When one is negligently upon a railroad track unconscious of his immediate peril and that peril is timely discovered by those in charge of the engine they may not punish him for his negligence by knocking him off and thereby killing him, or breaking his bones or mauling and smashing his body. Out of tenderness to life and limb they must do what every man must do for every other man, in times of peace, viz., use due care to preserve life and limb. Due care is care according to circumstance. Due care calls for the use of the means at hand to prevent one's injury to the person timely seen exposed to danger. The means at hand in this instance were bell, whistle and ability to stop. In some cases, the monoto-

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nous stroke of the bell might be due care. In others, easily put, the alarm whistle timely used might be due care. And (the gauge of duty arising precisely with the obvious danger and the circumstances attending the individual case, under the axiom "the greater the hazard the greater the care"—*per* VALLIANT, J., in *Woods v. Railroad*, 188 Mo. 229) in some extreme cases nothing short of stopping would be due care. Because plaintiff was a trespasser those of defendant's servants in charge of its locomotive were under no duty to look out for her in the country away from congested populations and between public crossings, absent a known and permitted public user, as here. But in this case they saw her a great ways off and saw her peril. Barring the duty to look for trespassers, the duty to use due care not to kill or maim them if they are seen in time, is precisely the duty owed to those not trespassers.

In *Lynch v. Railroad*, 208 Mo. l. c. 34, it was ruled: "But even if he (deceased) had been guilty of contributory negligence, running as he was for a half mile or two-thirds of a mile in plain view of the engineer and fireman on this engine and having indicated in no way to them his knowledge of their approach, it was their plain and obvious duty to exercise reasonable care for his safety and not run over him. From the time they saw him and observed, as alleged in the defendant's answer, that he was not looking back and was ignorant of their approach, it was their duty to warn him and to slow down the train *and stop if necessary in order to save his life.*"

The Chamberlain case was in Banc (133 Mo. 587). In discussing the Sinclair case (133 Mo. 233) and the Reardon case (114 Mo. 405) we considered an instruction in the Chamberlain case, which, among other things, told the jury that, if Chamberlain (quoting) "while walking upon defendant's track, became in

imminent peril of being struck by defendant's train, and defendant's employees in charge of said train became aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train, and to have averted the injury to said deceased, . . . and that they failed to exercise such care and stop said train, and that by reason of such failure to exercise such ordinary care, the said train was not stopped and said Chamberlain was struck and killed, then the jury must find for the plaintiff, though the jury may find that the deceased, Godfrey Chamberlain, was guilty of negligence in walking on defendant's track." In speaking to that instruction and approving it we said (p. 605): "But the instruction would not be proper in all cases, as the signal if given in time would be all that was required to apprise a trespasser, *until it is seen he apparently does not hear it. The engineer is not required to stop his train* if the trespasser is far enough away to warn him, and a timely warning is sufficient *until it is seen that for some cause it is not heeded; then it is his duty to avoid killing, even a trespasser, if by the exercise of ordinary care it can be done.*"

The sound general doctrine is thus summarized and formulated in an excellent treatise (2 Shear. and Red. on Neg., sections 483-4): "The rule stated in section 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases. It is universally agreed that this rule applies to all cases in which the defendant or his agent is actually aware of the plaintiff's danger. Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on, or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought

to use in favor of one lawfully and properly upon the track, that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence of which he is personally capable, after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train and will step off the track in ample time to avoid all danger, without any diminution of the speed of the train. . . . In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary. So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether, if the child does not appreciate its danger. . . . The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible, not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule; it has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which have previously stated it. Nothing more

is really meant by the courts using these phrases than a want of ordinary care, after becoming actually aware of the plaintiff's peril."

Assuming that due care may embrace the duty to give alarm signals in some cases, and the further duty, when those alarm signals fail (or apparently will fail) of their purpose, to stop the train, it remains to inquire: When does either duty arise? Attend to what we have ruled on that score: "It may be safely said as a general rule that the duty of care arises in all cases as soon as the perilous situation of the trespasser is discovered"—per MACFARLANE, J., speaking for the whole court, in the Sinclair case *supra*. Still further speaking to the point, he said (p. 242): "From these cases, and many others that might be cited, it seems to be well settled that *where no conditions intervene to confuse, or to prevent hearing a signal, and knowing its object*, it will be sufficient if given in time for the trespasser to leave the track safely." Speaking to the duty to stop the train we in that case further ruled that "this duty of the engineer arose as soon as he knew, *or by proper care ought to have known*, that deceased did not regard the warning signal."

And in a late case in Banc, *Degonia v. Railroad*, 224 Mo. l. c. 595, there is guarded general language by our Brother GRAVES apposite here, viz.: "Plaintiff's case therefore must proceed upon the theory that defendant's servants saw the perilous position of the deceased, and *saw such things* as would lead prudent persons to believe that deceased was oblivious to such perilous position, and after so seeing had time to obviate and avoid the accident by ordinary care and caution upon their part. It devolved upon the plaintiff to show these facts."

Justice is the constant and perpetual desire to give to every one his due, says Coke. It is not strange, then, that in a court of justice the just rule should be (as it

is in cases of this character) that when conditions intervene to confuse or prevent hearing an alarm signal or knowing its object, or where the conduct and actions of a party walking on a track with his back to a coming locomotive and a train of cars, should cause an engineer of ordinary prudence to conclude that such party did not or could not hear alarm signals and was continuing his walk on the track, the right of the engineer to act upon the presumption that he would leave the track before being hit ceases. Take an example by way of illustration. There is a working presumption indulged that a party approaching a street car track will stop and not step upon it in front of a going car, but that presumption ceases when by the actions and conduct of the traveler it would be apparent to a prudent motorman that he does intend to go upon the track (*Ellis v. Railway*, 234 Mo. l. c. 680-1 and cases cited). We can see no difference in principle between the two propositions. Both of them run on the theory that the party in charge of the car or locomotive should act on reasonable appearances and exercise due care in giving signals or in stopping.

Care to be *due* requires that alarm signals be given when they would be effective. And due care required that the attempt to stop should be made, as a last resort, when it would be effective; for if defendant owed any duty to stop at all that duty must begin when it amounts to something worth while. It must not be pretermitted until it amounts to nothing whatever. Any other view is hollow mummery—mere “words, words” that “lose the name of action.” Again, speaking of due diligence or care, it is axiomatic that he who has at his disposal the means of knowing, is held to know; that he who shuts his eyes when to open them and look is to see, is held to see; that where there is a duty to use diligence, those facts which diligence will discover are presumed to be known under the law of notice; and that what one knows and

what he ought to know is regarded in law as equivalent. These trueisms are more often invoked in negligence cases against a plaintiff, but where the boot is on the other foot and defendant is charged with a duty to use due care, as here, they fill a very useful office in determining the scope and discerning the elements of defendant's duty.

We come now to apply more closely the general principles announced to the facts of the case at bar.

The engineer of the Wabash train gave his alarm signals, under some of the evidence, at about the time the M. K. & T. engine was opposite or nearly opposite the school mistress and child, to their left 100 feet. He continued them while that engine and long, heavy train thundered past her. We think he is charged with the duty to see and know that intervening conditions had arisen likely to confuse and prevent her hearing those signals. At least that was a question for the jury. He was charged with the duty to know and realize further that her actions unmistakably indicated she had not heard the crossing signals behind her. Whatever a man who knew of an approaching train might do in remaining dangerously long on the track, this engineer had no right to assume that the young school mistress and little girl, both presumably armed with the quick ear of youth, timid and shrinking from danger, were trifling with death by remaining on the track after they heard the crossing signals behind them. It is not natural for a woman and child to act that way. Natural instincts are allowed to have their weight and constitute evidence to men of sense. [Stotler v. Railroad, 200 Mo. l. c. 146.] Moreover, the situation, before a finger was lifted, had been allowed to drift and become so crying that the engineer concluded the emergency air should go on simultaneously with his giving the alarm signals. Is that the usual course? According to his theory, with everything to be seen lying right under

his eye, he drove ahead for 600 or 700 feet after giving the crossing before giving the alarm signals. In other words he waited until the deafening noise from the near approach and passage of the M. K. & T. train would naturally, according to the physics of the matter, make it a matter of doubt whether the alarm signals would reach her and be effective. At least there was a question for the jury on that point and they were entitled to take that view of it. Moreover, there was testimony strongly tending to show that the engineer was mistaken about the distance. There is testimony that it was less than 600 feet, and some of it indicated he was as close to her as 180 or 200 feet. Such testimony raised an issue for the jury on the question of diligence and care in the *time* of giving the signals. Again, while the broad current of the testimony ran the other way, yet there was testimony of some value, negative in character, from which the jury might infer no alarm signals were given at all. There were silent facts, of which it may be said, though silent, they cry out (*dum tacent, clamant*), squinting the same way. We lay little stress on this feature of the case. We think if that had been the sole issue and the jury had found for plaintiff the duty of the trial court would have been to set the verdict aside as against the very great weight of the credible testimony. But when a case at law comes by appeal to this court, we have nothing to do with the weight of the testimony. The appellate function is to say whether there is any substantial testimony. A mere glimmer or spark, a mere *scintilla* will not do, but if there is substantial testimony, however small as compared to the great body of the proof, we have no right to meddle with the weight of it, or ignore it because negative in character. We deem it not space misused to reproduce some excerpts from a case in the House of Lords (*Railroad Co. v. Slattery*, L. R. 3 App. Cas., pp. 1155, 1164-5, 1167, 1181, 1182-3).

The Lord Chancellor said: "There is thus opposed to the evidence of *two persons* who say they did not hear, which may mean they did not observe, the whistle, and of one who says he did not hear it, but will not swear it did not take place, a body of witnesses, *ten in number*, including every person whose evidence could be supposed to be material, all of whom seemed to me to be entirely unimpeached and unimpeachable, who state in the most positive way that the whistling did take place.

"My Lords, I have already said that your Lordships have not now before you the question of whether the verdict was against evidence, or against the weight of evidence. But I feel bound to say that if that question were now open, I should, without hesitation, be of opinion that a verdict more directly against evidence I have seldom seen. It is stated that the learned judge before whom the case was tried was not dissatisfied with the verdict. I can only express my surprise that this should have been the case. As it is, it appears to me that the jury, actuated perhaps by feelings of compassion for a plaintiff who is no doubt much to be pitied, and willing to gratify those feelings at the expense of the appellants, have found the first issue, that of negligence on the part of the appellants, for the respondent, when it ought to have been found for the appellants. This, however, as I have already said, is not a reason for entering the verdict for the defendant. It is only a ground for a new trial. . . . I certainly cannot look on the result of this litigation as satisfactory. The appellants will, I fear, have to pay a sum for which I cannot think they ought to have been made liable, and the respondent and her children will recover money to which I do not think that their legal right is established. *But I cannot seek to prevent this by proposing to your Lordships*, on the only part of the case which is brought for your deter-

mination, to do what it appears to me would seriously encroach upon the legitimate province of a jury."

And Lord O'HAGAN, in the same case, said: "My Lords, the principle on which, I think, this case ought to be decided appears, to me to be well expressed in the trite maxim, '*Ad quaestionem juris respondent iudices; Ad quaestionem facti respondent juratores.*' That maxim is old but cannot be obsolete whilst trial by jury subsists among us. . . . As to the first question, whether the defendants were guilty of negligence, I cannot see how, possibly, it could have been taken from the jury. I shall not occupy the time of the house by any repetition of the narrative which has been lucidly given to it by my noble and learned friend on the woolsack. I shall only remind your Lordships that the learned Lord Chief Baron PALLES rightly confined the attention of the jury to the consideration of the alleged want of whistling, as the one instance of negligence with which they had to do; and that with reference to it there was a large body of testimony and clearly conflicting testimony. *Ten* witnesses for the defendants swore that *the whistling occurred* at the proper time and in the usual way; *three* witnesses for the plaintiff swore that, being in a position in which, if it so occurred, the sound should have reached their ears, *they did not hear it*. It is impossible not to be struck by the apparent weight of the defendants' proof. But, as was observed in the Irish Court of Common Pleas, the jury saw the witnesses, and the judge did not condemn the verdict. And, whether it was right or wrong, *the jurors along were competent, legally and constitutionally*, to decide between the ten who testified on the one side and the three who testified on the other. It was urged, and the authority of an eminent judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain

position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness—which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which *the jurymen, and they alone, were competent to pronounce.*”

The doctrine thus announced finds support in cases cited from our own reports in the briefs of counsel for respondent.

Again, taking the plainly confused situation, a situation so open and unusual as to be properly designated extraordinary—a situation in which a prudent engineer could see that there was a probability of alarm signals being drowned in the great volume of noise made by the heavy M. K. & T. freight train thundering past and near her—did the engineer use due diligence in applying his emergency brake? Did he not wait until he must have seen and known that the use of the brake was bound to be an idle formula? Mark, he could not possibly stop, after he began to stop, in time to save her at the rate he was going. He knew that or was bound to know it, which is the same thing. If the emergency was turned on precisely when the alarm signals began then there is some testimony tending to show that the air went on not 600 feet away, as the engineer says, but a great deal closer than that. Their spontaneous and instinctive judgment, born of facts that lay before the eyes of the railroad employees on the M. K. & T. train, showed them during the time their train was approaching and running for twelve or fifteen hundred feet, as we figure it, that this woman and child were in deadly peril and were unconscious

of it. What they saw the Wabash engineer must also be held to see.

We are not dealing with a case where a person attempts to cross a track so closely before a locomotive that the engineer has no time to save life, nor with a case where the peril of a trespasser is not seen in time to save him, nor with a case where there is nothing to prevent the alarm signals being effective. We are cited to many cases of that sort, but they are not in point under the record in the instant case.

Our conclusion is there was a case for the jury, hence the demurrer was well ruled.

II. While the main proposition for reversal (on which the whole force of the oral argument and marked labor in collecting authority in briefs were spent) is the demurrer to the evidence, yet, as said at the outset, there are subsidiary assignments of error, viz.: Defendant's counsel lodge sundry objections against two instructions. One is that without any evidence to support them the court submitted issues whether signals or warnings were given, whether any efforts were made to prevent injuring plaintiff, and authorized a recovery without a finding that the engineer realized plaintiff did not hear the signals. Another is that it was erroneously assumed that plaintiff would have heard a whistle if one had been sounded, and erroneously assumed that the engineer discovered plaintiff's peril in time to save her by the exercise of ordinary care. Another is that the same instruction authorized a verdict if she did not hear the signals although the engineer may have had every reason to believe she did hear them, and in that particular there was a conflict with four of defendant's instructions—that the instruction did not require the jury to find from the evidence that given signals were not heard, or that the engineer had good reason to believe they were not heard and after he discovered her

peril could by ordinary care save her. Another is the alleged assumption that the engineer could have stopped the train after discovering plaintiff's peril, and that it required more than the exercise of ordinary care. Another to both instructions is that they submitted to the jury the question whether plaintiff was a trespasser and was guilty of contributory negligence when that fact should have been declared as a matter of law by the court.

Acquiescing in the controlling prominence given to it by counsel, we considered the main proposition so fully that we feel justified in not disposing of those objections *seriatim* on full discussion, as we would have done if a suitable length to this opinion permitted. Counsel must rest content with the general ruling, to-wit, that we have not been able to find reversible error in instructions.

We make these general observations and let it go at that, to-wit:

The ruling on the demurrer disposes of some of them.

Some of them are refined and technical to a degree reflecting no little credit on the acumen of learned counsel, but in no way, that we can see, affecting the merits or tending to mislead the hard-headed men in the box.

In some of them, suggested doubts and uncertainties are cleared away under the doctrine of *aider* by one or the other of the twelve instructions given for defendant.

Some of them are answered by a reference to the testimony of the witness Collins who was watching the train and testified, in effect, that it did not slacken its speed until after plaintiff was struck (that testimony may have been untrue, but its falsity is not for our determination. Plaintiff was entitled to reckon with it as one hypothesis).

Some of them are answered by a reference to the negative testimony which, as heretofore pointed out, tended to show no alarm signals were given up to the time Miss Dutcher was struck. (However, liability was not alone predicated on that fact, but the matter was woven into an instruction and coupled with other facts put to the jury by the conjunction "and.")

Taking the whole body of the instructions (defendant's with plaintiff's) and reading them together, as we must, the case was fairly put to the jury.

The point is disallowed to defendant.

III. The court refused twelve of defendant's twenty-four instructions. Error is assigned on that score—the demurrer was one and is already decided.

One of those remaining told the jury that no warning signals were necessary until after the engineer discovered the teacher did not hear the rumbling of his train. It was well refused. When a twist of the wrist will sound a warning signal, why should an engineer dally and twiddle by speculating on the effect the rumbling of his own train had on a woman who was within the sound zone of a much nearer and much greater train? There is no testimony this engineer relied on *rumbling*.

Another was refused which practically declared, upon facts admitted, that plaintiff was precluded of recovery because she walked leisurely down the track without turning her head, and this although the jury believe "that no signal was given nor effort made to stop the train." That instruction was not the law of a case falling within the humanity rule. The demurrer disposed of it.

Another was refused declaring, in effect, that an alarm signal at 600 feet was due care and that the engineer was not required to stop the train when he came in stopping distance of plaintiff. That might be good law in a proper case, but not under the cir-

cumstances we are dealing with. The disposition made of the demurrer disposes of it precisely as the trial court did.

Another was refused calling the jury's attention to the noise of the M. K. & T. train and declaring as a matter of law that because of that noise it was plaintiff's imperative duty to look behind to see if a train was approaching, and if she failed in that she could not recover. In effect, that was mandatory instruction for defendant, therefore is covered by the demurrer and must be similarly ruled.

Another was refused declaring as a matter of law that if the alarm signals and attempts to stop began 600 feet from plaintiff and continued until she was struck she could not recover. That instruction invaded the province of the jury in determining what was due care under the particular circumstances of this case. Assuming our ruling on the demurrer is sound, the instruction was not the law of this case.

Another was refused declaring as a matter of law that plaintiff was guilty of such contributory negligence as precluded recovery. That instruction was in the very teeth of the humanity rule as expounded in the first paragraph of this opinion.

Another was refused telling the jury that defendant owed no duty to plaintiff except to not willfully and wantonly run upon her without warning. The willfulness and wantonness doctrine is exploded. The touchstone of duty in the law of negligence is due care, not a shade less or more. Due care under the circumstances of this case does not exclude the duty to stop, as the instruction does.

Another was refused taking from the jury the right to consider the noise made by the M. K. & T. train. That instruction eliminated the most pregnant fact in this case with one stroke of the pen. Defendant would hardly admit that it employed engineers who did not know that M. K. & T. trains made noises

the same as Wabash trains, or who are ignorant of the immutable law of physics that the proximity of a greater noise has a tendency to drown out more distant noise. Any boy who ever worked around a threshing machine when the dinner horn blew knows that. The evidence relating to this noise was admitted over objection. We shall recur to the matter when that ruling is considered. Some of defendant's suggestions anent the instruction may be better disposed of then.

Another refused instruction was predicated of the theory that if a whistle was sounded and if it could not be heard because of the noise of the M. K. & T. train then in that event plaintiff should be cast. That was not the law of this case either.

Another declared it to be the law that if the whistle was blown from three to six hundred feet from plaintiff and afterwards until she was struck and the engineer did all in his power to save her after discovering she did not get off the track to avoid her own injury, then the verdict must be for the defendant. That instruction under the circumstances of the case invaded the province of the jury by limiting the distance in which the engineer was obliged to begin an effort to warn and save plaintiff to within three to six hundred feet. It was well refused.

Another told the jury there was no evidence that plaintiff's position was one of peril from which she could not easily extricate herself (quoting) "*until the train got so close to had no time to step off her that she the track.*" We are not quite sure we understand the whole of this instruction. The part we do understand was wrong, the part we don't understand we express no opinion upon. If there was any substance in the quoted part, as originally drawn, it is likely counsel would have seen to it that it was brought here in proper form.

There was no error in refusing instructions for defendant.

IV. Error is predicated of a ruling of the court permitting plaintiff to show the noise of the M. K. & T. train, and further that any experienced person observing the trains could see that the two would pass at about the place she was struck. It is argued these were specifications of negligence not pleaded in the petition. But these facts were *evidential*. They related to the charge of a failure to use due care in warning and stopping. We think the point without substance.

V. The court modified and gave for defendant instruction 15, reading: "The court instructs the jury that under the evidence in this case the plaintiff was a trespasser on defendant's railroad track and the defendant owed her no duty *in the first instance* except to warn her by the usual signals of the approach of the train in time for her to step off the track and avoid being struck." (Note: the italicized clause was written in by the court). As originally written the instruction was bad in excluding any duty to stop under any circumstances. Even as modified and given it is not in accord with the bulk of defendant's testimony which pointed to a situation at the time apparently demanding the instantaneous application of the air with the blowing of the whistle. If it did any harm it did harm to plaintiff, not defendant.

VI. It is next argued that the inflammatory argument of plaintiff's counsel was grossly prejudicial and that the court erred in overruling defendant's objections thereto and in failing to rebuke counsel; and next that the verdict is excessive. We do not think the verdict excessive. Plaintiff is confessedly a permanent cripple, her chances to get on in life are lessened, her injuries are extremely grave and her sufferings pro-

longed, accute and not over. There is no evidence of simulation or hysteria. She asked \$40,000 and got one-fourth of it. Compared with many judgments we meet with here, it was sober and modest, reflecting credit on the management of defendant's counsel.

We have examined with pains the colloquies between court and counsel during the jury argument of Mr. Harrington on behalf of plaintiff. In some of them there was no ruling by the court and no exceptions saved for a failure to rule. In some of them the court on request did admonish and rebuke him. In others objections were made and sustained and no request was made to rebuke counsel. In still others the objections were without vitality.

We do not feel justified in reversing the judgment because counsel by inadvertence was betrayed during the hot foot of the argument into straying a little outside the record, for which he was admonished by the court. To my mind the case is not a close one, and sure it is that the size of the verdict does not show that the inflammation, if any, *arguendo*, bred unseemly inflammation in the mind of the jury.

The premises all considered, the judgment should be affirmed. It is so ordered. *Valliant, C. J.*, and *Ferriss, Kennish* and *Brown, JJ.*, concur; *Woodson* and *Graves, JJ.*, dissent.

DISSENTING OPINION.

WOODSON, J.—On motion for a new hearing in this cause, one of the judges dissented from the Divisional opinion, and in consequence thereof, the cause was transferred to court in Banc; and upon reargument a majority of the judges dissented from the Divisional opinion and ordered Brother LAMM to write the opinion for the court, which he has done in a very able manner.

But after a careful consideration of his opinion, I am forced to dissent therefrom.

It seems to me that the error my associates have fallen into is in assuming that the employees in charge of the train upon the Wabash road and those upon the M. K. & T., were near each other, and could see and hear each other as though they were seated around a table in a quiet room, discussing the case as we did in consultation; whereas the facts are that when the employees of the Wabash first saw or could have seen the respondent the train upon which they were was about two miles away and was running about fifty miles an hour, and those on the M. K. & T. were a mile or more away in the opposite direction and that train was running about thirty-five miles an hour, neither knowing where they would pass each other, nor where they would pass the respondent, who was somewhere between them.

But independent of that fact, I am still of the opinion that the conclusions reached in the divisional opinion is correct, and I therefore adhere to the views there expressed, and adopt that opinion as my dissenting opinion in Banc, which is hereto attached, and is as follows:

This is an action to recover damages for personal injuries sustained by plaintiff, inflicted by the alleged negligence of the defendant in running one of its freight trains against her on the 6th day of September, 1906, near the city of Moberly, Randolph county, Missouri.

The suit was instituted April 20, 1907, in the circuit court of Adair county, and thereafter a trial was had which resulted in a verdict and judgment for the plaintiff for the sum of \$10,000. From that judgment the defendant duly appealed to this court.

Some twenty-five or thirty witnesses testified in the case, and, consequently the abstract of the record

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is quite voluminous, covering about two hundred printed pages. For this reason we will be able to state only the substance of the evidence; and as there is but little dispute as to the main facts of the case, a more extended statement of the evidence will not be necessary. However, where there is a conflict in the testimony it will be duly noted in the opinion.

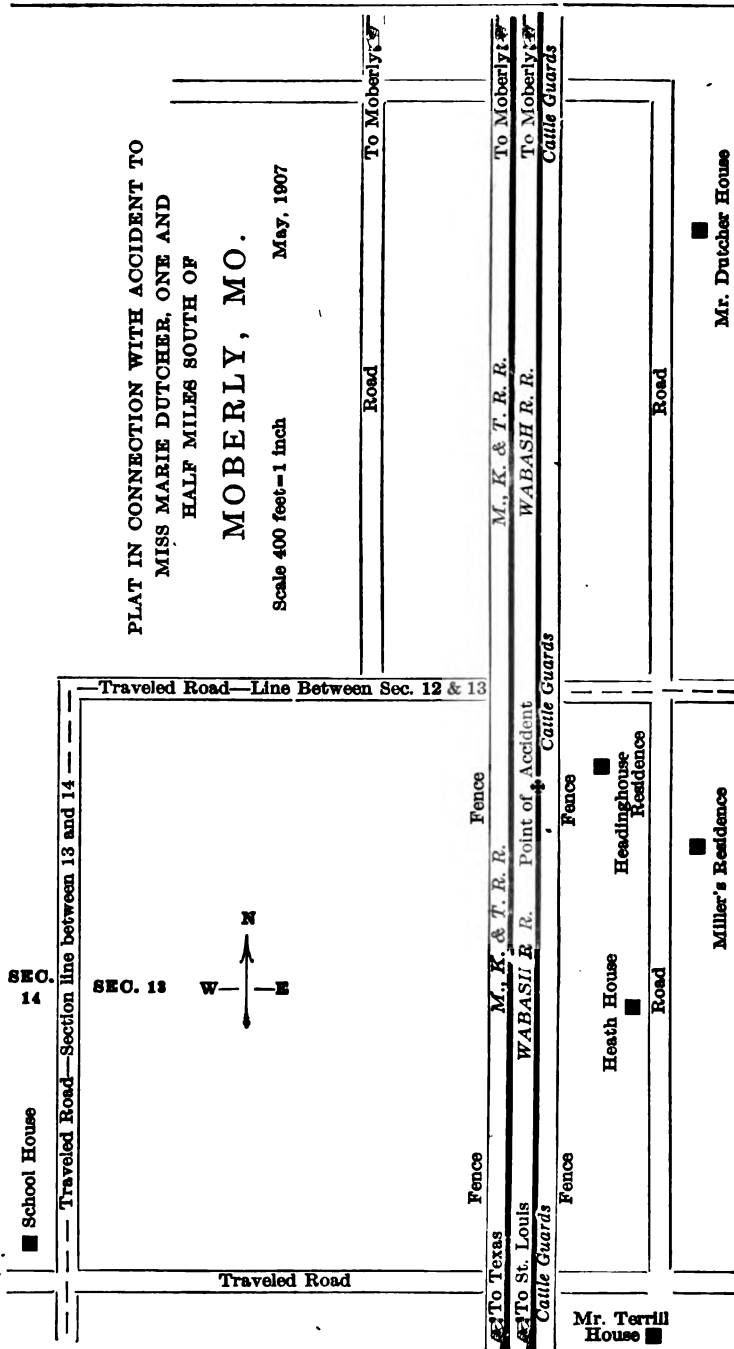
The facts of the case as disclosed by practically all of the evidence are as follows:

The track of the defendant company and that of the Missouri Kansas & Texas Railroad Company (which will hereafter be called the "Katy") parallel each other for several miles, one hundred feet apart, and cross at grade a public highway, running east and west, a short distance south of Moberly, through a strictly farming community.

The plaintiff was struck and injured at a point about three hundred feet south of the crossing before mentioned, which is known as the "Headinghouse crossing." At the place of injury the railroad tracks run through a quarter section of farm land, the Headinghouse crossing being on the north side thereof, and the Terrill crossing being another crossing on another public road a half mile south of the former crossing. The tracks were inclosed by good wire fences and cattle-guards. There were also public roads on the east and west sides of this quarter section of land, thus surrounding this tract of land by four public highways, all of which at the time of the accident were smooth, dry and in good condition. The track at this point had not been used by pedestrians as a public highway.

The following plat, introduced in evidence by plaintiff and marked "Ex. A.," will shed much light upon the scene of the accident.

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At the time of the injury plaintiff was eighteen years of age and was living with her brother, Roscoe Dutcher, a quarter of a mile north of the northeast corner of this quarter section of land, on the public road running north and south along the east side of this quarter section. She was teaching school in a schoolhouse situated on the southwest corner of this same 160 acres.

About four o'clock p. m. on September 6, 1906, after the close of school, plaintiff with one of her pupils, ten years of age, a daughter of Frank Headinghouse, walked east on the public road on the south side of this tract of land until she came to the track of the Katy. At this point they crossed over the cattle-guard and walked north on said last mentioned railroad about a quarter of a mile, near the whistling post. At the latter point the plaintiff and the said little girl crossed over to the track of the defendant company, which was about one hundred feet east of the track of the former company. The plaintiff testified that as she crossed over to the track of the defendant company she looked north and south and saw no train on either road, and that her view was unobstructed both north and south for more than a mile. The track was practically level with a slight up-grade to the north. Upon reaching the track of the defendant company, she and the little girl proceeded to walk north, she between the rails and the little girl on the ends of the ties west of the west rail. At no time while so walking did plaintiff look or listen for a train behind her, though knowing she was on the main line of the defendant company leading from St. Louis to Kansas City, on which trains were hourly passing. Within a few minutes after they reached the defendant's track an extra freight train from St. Louis rounded the curve three and a half miles south of Moberly, and when a quarter of a mile south of Terrill crossing gave the regular crossing whistles, being two long and two short

blasts. This train was composed of twelve cars, a caboose, engine and tender, and was about five hundred feet in length. Eight of the cars were equipped with air-brakes, and four of them were without air-brakes. At the whistling post, midway between the Headinghouse and Terrill crossing, the regular crossing whistles were blown for the former crossing. The engineer saw the plaintiff and the little girl walking along the track in the manner before stated. He first saw them when he was about a mile from them. He testified that he had no reason to doubt that they had heard the signals and would leave the track, but almost immediately after giving the crossing whistles he began to think they had not heard them, and seeing that they did not look around or step aside he immediately applied the air in emergency, pulled the sand lever and began giving the danger signals and continued them until she was struck.

He also testified that when he applied the air the plaintiff was about six hundred feet in front of the engine. Practically all of the witnesses testified that the danger whistles were continuously sounded, and that the fireman rang the bell constantly until plaintiff was struck, which was at a point about three hundred feet south of the Headinghouse crossing. S. G. Brown, a brakeman on the defendant's train, was riding in the pilot of the engine and as the train approached the plaintiff he called to her at the top of his voice, warning her of her danger, but was unable to attract her attention.

Immediately before and at the time plaintiff was struck a freight train on the Katy was passing south. Practically all of the employees on this train saw the plaintiff, heard the danger signals given by the defendant for her, and several of them called to her and pointed back to the defendant's train, warning her of its approach and of her danger. She saw and heard them but heeded them not, because as she testified, "I

thought they were trying to flirt with me, so I turned my face to the north and walked on."

Prior to the application of the air-brakes the defendant's train was running from twenty-five to thirty-five miles an hour, and at the time it struck plaintiff it had slowed down to a speed of from sixteen to eighteen miles an hour.

The evidence also tended to show that this train, equipped as it was with due care could have been stopped in a distance of from eleven to twelve hundred feet, and within three hundred feet if the train was running only twelve miles an hour. The engineer and fireman who were in charge of this engine testified that they did everything in their power to warn the plaintiff of her danger as soon as they had reason to believe she was not going to leave the track, and that immediately they employed all the appliances at their command to slacken the speed of and to stop the train, and thereby avoid striking her, but all to no avail, as the train was too near her to be stopped before striking her. The engine ran some six or seven hundred feet after striking the plaintiff, or some eleven or twelve hundred feet after the emergency brakes were applied.

I. Counsel for plaintiff base her sole right to a recovery upon the last-chance or humanitarian doctrine.

The first insistence is that the verdict and judgment should stand, for the reason that the engineer in charge of the engine which struck the plaintiff testified that he saw her on the track for a distance of a mile before the train struck her, and that there was evidence tending to show that he failed to give her any warning whatever of the approaching train.

The evidence above referred to is the testimony of the witness Collins, introduced on behalf of plaintiff, who testified as follows:

"Q. State Mr. Collins, whether or not from the time you first observed the train when it was about one-fourth of a mile from her as you have stated, whether or not from that time on until the time it struck her there was any whistling by the Wabash train? A. I heard the whistling, but don't know which engine was doing the whistling. I heard whistling. I saw no steam from the Wabash whistle. I don't remember of hearing any bell."

If this had been all of Mr. Collin's testimony touching that proposition it might have had some weight and probative force, but when read in connection with all of his testimony but little, if any, importance should be attached to it.

Previous to giving the above testimony Collins testified that he was a peddler and that at the time of the accident he was walking south on the Katy track, and saw plaintiff on defendant's track. He stepped aside to allow the train on the former road to pass; and that at the time he was two hundred feet north of the Headinghouse crossing, or about five or six hundred feet north of the point where the plaintiff was struck. He also testified that he did not remember whether he stepped off on the east or west side of the Katy train. But a little later on he further testified as follows:

"Q. Where was the Katy engine at the time she was struck? A. On the Katy track. "Q. I believe you located Miss Dutcher here somewhere south of the Headinghouse crossing, and you say, as I understand, the caboose of the M. K. & T. train was directly west to her—is that right? A. Did I say that?

"Q. Where was the caboose? A. A little south of her.

"Q. How much? A. I have no idea.

"Q. Then you can't give us any idea whether that caboose was ten feet south of her or one hundred

feet or two or three hundred feet. A. No, it was not very far south of her.

“Q. Is that approximately correct? A. I was right square behind that train, how could I tell? If I had been at the side may be I could give you some idea.”

The evidence in the case, as well as Collin's own testimony when all read together, conclusively shows that he stepped off on the west side of the Katy train, and that said train completely obscured his view of the approaching train on the defendant's track. That being true, of course he could not state, as he subsequently admitted, which engine gave the danger signals which he said he heard; nor could he, for the same reason, see the steam escape from the defendant's engine had it done so. In fact, by reading Collin's testimony it will be seen that he nowhere states that he was in position to see or that he looked at the defendant's engine or at the escaping steam therefrom—he only stated that he saw no steam. That being true, as before stated, his evidence was insufficient to sustain a verdict, especially when the record discloses that a score or more of witnesses, some of whom were introduced by plaintiff and others by the defendant, testified that the danger signals were repeatedly given by the defendant company in ample time for the plaintiff to have stepped from the track.

This insistence is, therefore, ruled against the plaintiff.

II. It is next contended by counsel for plaintiff that the defendant was guilty of negligence in not slackening the speed of or stopping the train after its employees saw her in a place of danger, although they had ample time in which to have done so had they exercised ordinary care under the circumstances.

We are not certain that we clearly understand

the position of counsel in the premises, which is stated by them in the following language:

“The M. K. & T. train was composed of twenty-five cars and an engine, and while a witness estimated it at about nine hundred feet in length, it must have been about ten hundred and fifty, certainly not less than one thousand feet long, and we shall hereafter treat it as being one thousand feet in length.

“At the time of accident the M. K. & T. caboose was directly opposite or a little south of plaintiff, estimated by the witness as being all the way from directly opposite to three hundred feet south of her. It is thus clear, being a fact physical in its nature, that from the time the firemen and other operatives on the M. K. & T. train began waving at plaintiff and the time she was struck said M. K. & T. train ran a distance of from thirteen hundred to sixteen feet.

“It was proven by the plaintiff and admitted by the defendant’s witnesses that when the M. K. & T. operatives began waving at plaintiff the M. K. & T. engine was at the Headinghouse crossing, three hundred feet north of plaintiff, and when plaintiff was struck the M. K. & T. caboose was from directly opposite plaintiff to three hundred feet south of her.

“The M. K. & T. train was running from fifteen to twenty-five miles an hour, and the Wabash train was running from twenty-five to thirty miles an hour. Thus, while the M. K. & T. train was running the thirteen hundred to sixteen hundred feet the Wabash train necessarily moved a distance of from sixteen hundred to eighteen hundred feet.

“It is also true the conductor and brakeman in the M. K. & T. caboose discovered plaintiff’s peril and began waving at her when they were as far away from plaintiff, or practically as far away from her, as the engineer in the Wabash engine; therefore said Wabash engineer had as good an opportunity to see plaintiff and the little girl, and observe their manner and

conduct, as the conductor and brakeman and other operatives in the M. K. & T. caboose.

"After the Wabash train struck plaintiff it ran a distance of seven hundred and forty to seven hundred and fifty feet before it stopped. This is evident because the train stopped so that the rear of the train was two carlengths south of the Headinghouse crossing. Plaintiff was struck at a point three hundred feet south of the Headinghouse crossing. Said train therefore ran the length of the train and the distance between the point of accident and the rear end of the train at the place where it stopped, that distance being from seven hundred and forty to seven hundred and fifty feet."

The foregoing process of locating the trains on the M. K. & T. and Wabash tracks, immediately prior to the accident, the rates of speed each was traveling and the place where the latter stopped after striking plaintiff forms the basis upon which the contention is made that the train which struck plaintiff must have run a distance of from sixteen hundred to eighteen hundred feet after the employees on the M. K. & T. road saw her perilous position, and at which time the servants in charge of the defendant's train should have discovered it had they exercised ordinary care, which would have given defendant's servants ample time in which to have stopped the train before it struck her.

While counsel for plaintiff, in our judgment, have not fairly stated the substance of the evidence bearing upon the several propositions presented which constitutes the basis of their contention, but in lieu thereof have stated their own conclusions and deductions drawn from the evidence, but for the sake of argument we will suppose that the evidence did tend to support the second contention of counsel for plaintiff, as stated at the beginning of this paragraph; but in so doing we must not overlook the fact that simply

because the engineer did not sound the danger signals or attempt to stop the train when he first discovered plaintiff on the track that was any evidence that he was guilty of negligence in that regard, for the reason that the law is well settled in this and other states, that the trainmen have the right to presume that adult persons walking upon the track for convenience can hear an approaching train and will heed all danger signals given, and will get out of its way. It is equally well settled that they may rely upon that presumption until they are informed or have reasonable grounds to apprehend such person is ignorant of the train's approach, or that he has not heard the signals given. [Maloy v. Railroad, 84 Mo. 270, l. c. 275; Bell v. Railroad, 72 Mo. 50; Sinclair v. Railroad, 133 Mo. 233.]

In discussing the foregoing principles of law, this court in the case first mentioned used this language: "There is no evidence that it was owing to any neglect of duty that his danger was not discovered sooner. The engineer may have seen him, when he was two miles west of the trestle. Was it his duty then to stop the train or check its speed? He may have seen him when within a hundred yards; did the duty then arise to stop, or check the speed of the train? If the train men must stop the train or check its speed whenever they see a trespasser on the track, of what practical utility would railroad time tables be? The case, even with such of the additional evidence as could possibly have been admitted in the first instance, would not have been such as to entitle plaintiff to a verdict. The train men have a right to suppose that adult persons walking upon their track for their convenience, can hear an approaching train, and will get out of its way. This train made such noise that persons a quarter of a mile further from it than the deceased heard it distinctly, and recognized it as the noise made by an approaching train."

And in the second case cited, the court, speaking through Judge NARON, said: "It may be observed in advance of an examination of the real point and only point involved in this case, that young Bell was guilty of the grossest negligence beyond all dispute, a negligence difficult to be accounted for, assuming him to have been a young man of ordinary intelligence and without any defect of sight or hearing, and there was no proof that he was not. His father had recently moved into the neighborhood of Meadville, and he had never lived near to any railroad before, and the boy was, therefore, naturally not familiar with their detailed operations. Still he must have known, without any such familiarity, of the danger of standing on a railroad track and of the necessity of watching for the approach of a train. He must have known that a person in such a position, to be safe, must use his eyes and ears. His attention was absorbed by a locomotive of a freight train on the switch south of the main track. My conjecture is that he believed that he was on a switch himself and that the main track was the one where he saw this train standing preparing to move. He must have heard the alarm whistle which was sounded repeatedly, at first at a distance of 600 feet, but, as I conjecture, thought the approaching train was on the same track with the train before him. It is true he did not hear the man who hallooed to him to get off the track, to look out for the train, because the wind was blowing rather strong from the west or northwest, but the sharp whistle used to alarm cattle would be far more distinct and powerful than a human voice, and could scarcely have been unheard. He had time after the whistle was sounded to get off the track—he was near the south rail—and two steps would have placed him out of the reach of the cars. . . . The engineer had a right to assume, when the boy came in sight, that he would step off upon the sounding of the alarm whistle, and the only question

in the case was, whether, upon seeing the boy's position on the track, and that he persisted in staying there after repeated and continuous alarms of the whistle, the engineer did use all of the appliances in his power to prevent a collision, according to his best judgment. Judgment reversed and cause remanded."

There are numerous other cases in this court announcing the same rule.

In passing we may with propriety state that in the case at bar the plaintiff did not make out as strong a case against the defendant as the plaintiffs did in the cases quoted from, for unquestionably she heard the danger signals, which were sounded several times, and saw the employees on the Katy train pointing to the approaching train on the defendant's track; but, unfortunately for her, she disregarded them, believing doubtless, the blasts of the whistle were from the Katy train, and that the gestures and warnings given her by the employees of the latter were flirtatious. All of this was the plaintiff's misfortune, but in no sense was it the fault or negligence of the defendant.

But independent of that, the main reason why plaintiff should be denied a recovery in this case is, according to her own theory of the case, she was guilty of the grossest kind of negligence, amounting almost to recklessness, which continued down to the place of and to the very instant of her injury, and directly contributed thereto. Upon this question the evidence was undisputed, that plaintiff crossed over the cattle-guards into the inclosed right of way of defendant, and walked about a quarter of a mile down the center of the trunk line of defendants without looking or listening for approaching trains, notwithstanding she knew trains were hourly passing thereon, heedless of the danger signals given, which were continued down to the moment the injury occurred, and equally unmindful of the warning given her by the employees in charge of the Katy train.

If it should be conceded that the defendant, in the first place was guilty of negligence in not stopping or slackening the speed of the train in time to have prevented striking plaintiff, still it stands undisputed that she was given timely warning of the train's approach, and that had she heeded that warning she would have had ample time in which to have stepped from the track, and thereby avoided the injury. Her failure to do so was clearly contributory negligence, if not the sole and proximate cause of her injury.

Upon this state of the record, according to the rule laid down by all of the best considered cases in this state and elsewhere, the plaintiff is not entitled to a recovery, for the reason that the humanitarian or last-chance doctrine has no application, but the law of contributory negligence governs.

While I do not believe in the wisdom of the so-called humanitarian or last-chance doctrine, for the reasons I point out in the case of *Murphy v. Railroad*, 228 Mo. 56, since, however, none of my learned associates concurred in my views there expressed, that doctrine must be acquiesced in and accepted by all as the settled law of this State, and I humbly bow thereto. But in doing so I recognize, as all others do, that there is at least an apparent conflict between some of the cases of this State bearing upon that subject.

The cleavage separating the humanitarian doctrine from the law of negligence and contributory negligence as hewn by this court has not at all times been as clear as it might be hoped for, consequently both the bench and the bar have met with much confusion and difficulty in its administration; and for that reason, even at the risk of being criticised for prolixity, I feel justified in stating the origin of the humanitarian doctrine, the reason for its existence, its growth and when applicable, as shown by some of the leading cases bearing upon that subject.

The humanitarian or last-chance doctrine had its origin in the year A. D. 1842, and was first definitely announced in the case of *Davies v. Mann*, 10 M. & W. 546.

Before stating the facts of that case, I desire to call *special attention* to the fact that the plaintiff's negligence had *culminated and ceased to be a factor in the case*, and notwithstanding that fact, *thereafter the defendant being conscious of the peril of plaintiff's ass*, and that it could not save itself, drove his team and wagon over and killed it, *without exercising ordinary care* to save the brute. In the consideration of the cases, I hope the foregoing observations will be constantly in mind.

The case above mentioned established an important exception to the rule of contributory negligence, called by some the "humanitarian doctrine," and by others the "last-chance doctrine." The facts and opinion in the case mentioned are as follows:

"Plaintiff having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question, the ass was grazing on the off side of the road about eight yards wide when the defendant's wagon with a team of three horses, coming down a slight descent at what the witness termed a smartish pace, ran against the ass, knocked it down and the wheels passing over it, it died soon after. The ass was fettered at the time and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge told the jury that though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent the getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might

have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40 s."

"PARK, B. This subject was fully considered by this court in the case of *Bridge v. Grand Junction Railway*, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule is laid down with perfect correctness in the case of *Butterfield v. Forester*, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; *if by ordinary care he might have avoided them he is the author of his own wrong!* In the case of *Bridge v. Grand Junction Railway Co.*, there was imputing negligence on both sides; here it is otherwise; and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that if they were of the opinion that it was caused by the fault of defendant's servant in driving too fast, or which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public high-

way, or over a man asleep there, or the purposely running against a carriage going on the wrong side of the road."

In Dyerson v. Railway, 174 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 133, this question is considered with much care and great force. We quote from page 141:

"If in the present case the plaintiff was entitled to recover in spite of his own negligence, it must be because the order of its occurrence with respect to that of the defendant made the latter the proximate cause of the injury. This, indeed, is his contention, and to support it, reliance is placed upon the following text, which was quoted with approval in Metropolitan Street Ry. Co. v. Arnold, 67 Kan. 260, and the substance of which is to be found also in volume 7 of the Encyclopaedia, at page 387; 'And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice; and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of the following injury.' [7 Am. & Eng. Ency. Law, (2 Ed.), p. 387.] This may be accepted as a correct statement of a principle of universal application, according with both reason and authority, provided the words "after its occurrence" be interpreted to mean after the person concerned had ceased to be negligent. The rule that under the circumstances stated the neglect of one party to discover the omission of the other is to be held to be the sole proximate cause of a resulting injury is not an arbitrary, but a reasonable one. *The test is, what wrongful conduct occasioning an injury was in operation at the very moment it oc-*

curred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. *If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other.* As is said in the paragraph from which the foregoing quotation is made: 'It is only when the negligence of one party is subsequent to that of the other that the rule can be invoked.' In a note printed in volume 2 of the supplement to the American and English Encyclopaedia of Law, (2 Ed.), at page 64, many recent cases are cited bearing upon the subject and it is said: 'This so-called exception to the rule of contributory negligence (i. e., the doctrine of the last clear chance) will not be extended to causes where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence.'

"In the present case it may be granted that the negligence of the plaintiff began when he walked between the track and the ice box on the way to get the bucket, and that the employees in charge of the engine were themselves negligent in not discovering this negligence on his part, and the peril to which it exposed him and taking steps to protect him. But his negligence as well as theirs continued up to the moment of the accident, or until it could not possibly be averted. His opportunity to discover and avoid the danger was at least as good as theirs. His want of care existing as late as theirs, was a concurring cause of his injury, and bars his recovery. This determination is entirely consistent with what Mr. Thompson in his work above cited, sec. 240, has styled the "last chance" doctrine, as is obvious from a consideration of the terms in which it is stated. As originally announced it was

thus phrased: 'The party who has the last opportunity of avoiding accident is not excused by the negligence of anyone else. His negligence and not that of the one first in fault is the sole proximate cause of the injury.' Mr. Thompson rewords it as follows: 'Where both parties are negligent, the one that had the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it—his negligence being deemed the direct and proximate cause of it.' Expressions are to be found in the reports seemingly at variance with the conclusion here reached, but for the most part the decisions holding a defendant liable for failure to discover and act upon the plaintiff's negligence were made in cases which were, in fact like Metropolitan Street R. Co. v. Arnold, supra, or were decided upon the theory that they fell within the same rule. There the plaintiff's decedent while riding a bicycle was, through his own fault, run into by a street car. He clung to the fender, was carried some seventy-five feet, then fell under the wheels and was killed. A judgment against the street car company was upheld only upon the theory that after he had reached a position of danger *from which he could not extricate himself—that is, after his negligence had ceased*, the defendant's employees were negligent in failing to discover his peril and stop the car. In Robinson v. Cone, 22 Vt. 213, 223, 54 Am. Dec. 67, the writer of the opinion says: 'I should hesitate to say that, if it appeared that the want of ordinary care on the part of the plaintiff, at the very time of the injury, contributed either to produce or to enhance the injury, he could recover because it seems to me that is equivalent to saying that the plaintiff by the exercise of ordinary care at the time, could have escaped the injury.'

"The principle thus intimated was embodied in a decision in French v. Grand Trunk R. Co., 76 Vt. 411, 58 Atl. 722, where it said: 'It is true that when

a traveler has reached a point where he *cannot help himself, cannot extricate himself*, and vigilance on his part cannot avert the injury, his negligence in reaching that position *becomes the condition and not the proximate cause* of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself and, by vigilant use of his eyes, ears and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it there can be no recovery.'

"To the same effect are these extracts: 'There is no testimony suggesting negligence on the part of the driver that does not convict Doyle of an equal or greater degree of negligence. One had no better opportunity to anticipate the accident, nor any better means of preventing it than the other. If, therefore, there was negligence, it was concurring negligence, continuous and mutual up to the instant of the accident which disentitles the plaintiff to recover. [Consumers' Brewing Co. v. Doyle, 102 Va. 403, 46 S. E. 391]. In numerous cases it has been held that the plaintiff's conduct is not contributory negligence, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care by the defendant. That rule prevails when the plaintiff is in position of threatened contact with some agency, under the control of the defendant, *when the plaintiff cannot, and the defendant can prevent the injury*. It does not apply where *both parties are contemporaneously and actively in fault* and by their mutual carelessness an

injury ensues to one or both of them. . . . The rule does not apply where, as in the case before us, the negligence of the party injured continues up to the moment of the injury, and was a contributing cause thereof.' [Robards v. Indianapolis Street Ry. Co., 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953]. 'The plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be proximate cause of the injury The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of defendant are practically simultaneous.' [Butler v. Rockland, T. & C. Street Ry. Co., 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775.]

"In Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724, it is said of the rule holding the defendant liable notwithstanding the contributory negligence of plaintiff: 'It applies in cases where the defendant, knowing of plaintiff's danger *and that it is obvious that he cannot extricate himself from it*, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where *both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it.*' Of the same rule it is said in O'Brien v. McGlinchy, 68 Me. 552: 'This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and defendant can, prevent an

injury. . . . But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them.' In *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 755, 25 L. R. A. 287, 19 S. E. 863, 923, the general rule is thus concretely stated: 'Applying the rule which we have stated to accidents upon railroad tracks it may be illustrated as follows: First, there must be a duty imposed upon the engineer as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout in order to discover and avoid injury to persons who may be on the track and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. *Hence, if A, being on the track and after this decisive negligence, fails to look and listen, and in consequence is run over and injured, his negligence is not concurrent merely, but really subsequent to that of the engineer* and he cannot recover, as he, and not the engineer, has 'the last clear opportunity of avoiding the accident.' If, however, A is on the track . . . and while there, and before the decisive negligence of the engineer, he, by his own negligence becomes entangled in the rails that he cannot extricate himself in time to avoid the collision *and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A would be previous to that of the engineer and the engineer's negligence would be the proximate cause, he, and not A, having lost the clear opportunity of avoiding the injury.* The same result would follow in the case of a wagon negligently stalled

when no effort of the owner could remove it, and there are other causes to which the principle is applicable.' The principle running through these cases is reasonable, is consistent with the general rules that have met with practically universal acceptance, and, if adhered to, will correct a part of the confusion now attending the application of the law of contributory negligence. The judgment is affirmed."

There are able and quite exhaustive notes appended to this case, and to that of *Bogan v. Railroad*, 129 N. C. 154, 55 L. R. A. 418, written by the learned editor, reviewing all the decisions from the various states, as well as those of the Federal courts, showing that the prevailing rule is that if the negligence of the plaintiff or deceased continues down to the time of the accident the humanitarian or last-chance doctrine has no application.

The following quotation is from the last paragraph, col. 2, p. 422, of the *Bogan* case:

"But even when the essential prerequisite of a duty resting upon the defendant has been established, there is still another element that must appear before the doctrine can be applied, or at least before it can be applied so as to support a recovery. As already stated, the doctrine operates by characterizing the breach of duty on defendant's part, intervening between the plaintiff's negligence and the accident, as the sole proximate cause of the accident. In order that this condition may exist, it is obvious that the negligence of the plaintiff or deceased must be regarded as having expended itself and having culminated before the breach of the defendant's duty or at least before the culmination of that breach of duty. If, notwithstanding a breach of duty on the defendant's part, the plaintiff's negligence must be regarded as continuing up to the very instant of the accident, it is clear, either that the negligence of the par-

ties is concurrent, and, therefore that a necessary prerequisite of the doctrine is lacking, or that the application of the doctrine will put the plaintiff himself in the position of having had, but for his own negligence, the last clear chance to avoid the accident, thereby making the doctrine operate against him. For instance, *if a person in full possession of all his faculties is walking along a railroad track* upon which he knows trains frequently pass, without paying any attention to his surroundings, and the engineer of an approaching train, by reason of the omission of his duty to keep a lookout, fails to see him, it would seem that the latter would have the last clear chance to avoid the accident, since it is apparent that if he discovers the train (which in the exercise of due care, he is bound to do), he can step from the track and avoid the collision after the train has reached a point at which no effort on part of the engineer can prevent a collision. In the view most favorable to the trespasser, his negligence is, at least, concurrent with that of the engineer. Many of the courts which apply the doctrine seem to pay too little attention to this element. The North Carolina Supreme Court, however, while taking different views at different times as to when the negligence of the plaintiff or deceased must be regarded as continuing, and when it might be regarded as having culminated before the defendant's negligence, have, nevertheless, recognized the importance of this consideration. Thus, the decision in *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923, denying the liability of a railroad company for running over a drunken trespasser, lying asleep on the track, notwithstanding that the engineer was negligent in failing to see him, is upon the ground that the intoxication of the trespasser did not relieve him from the duty of exercising due care, and that a sober man in the same position would, by the use of his senses have perceived the approach of the train, and have

been able to escape from the track after the engine had reached a point at which any effort on the part of the engineer to avert the accident would have been ineffectual. This decision was afterwards overruled by *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264, owing to a change of view on the part of the court with respect to the effect of the defendant's intoxication, the court taking the view in the latter case that the trespasser's negligence was not continuing, but culminated when he lay down upon the track and became unconscious of the danger. A stronger case for holding that the unconsciousness of his danger on the part of a trespasser lying on the track will relieve his negligence from its character as continuing negligence, is where, as was claimed in *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632 *infra*, 2, the trespasser had fallen on the track in a fit. In that case it was held that though the trespasser was negligent in going upon the track in the first instance, he was not chargeable with continuing negligence if his helplessness was due to a fit, but that it would be otherwise if it was due to voluntary intoxication. Some of the decisions that deny the liability of a railroad company for running over a drunken trespasser lying on the track are explainable on the ground that the company owed no duty to keep a lookout for trespassers and others, as already suggested, upon the ground that the negligence was regarded as continuing. These cases may, therefore, be harmonized so far as the doctrine of "last clear chance" is concerned, with cases that hold the company liable under such circumstances.

"If the view of the doctrine of 'last clear chance' herein suggested is correct, it follows that a statement to the effect that contributory negligence will prevent recovery for any but a wanton or willful injury is, when strictly construed, entirely consistent with the doctrine of 'last clear chance,' even when the grava-

men of the action is negligence. It is probable, however, that in some cases, in which such statements are made the court intended to deny any such qualifications of the doctrine of contributory negligence as that involved in the doctrine of 'last clear chance.' In many of the cases, however, in which such statements are made, it is clear that negligence of the plaintiff, though it began before the defendant's breach of duty, nevertheless continued up to the very instant of the accident, and was, therefore, subsequent to, or at least concurrent with the defendant's negligence. When that is the case, it frequently happens that the court simply applies the doctrine of contributory negligence without referring to any qualification of that doctrine, except that it does not prevent a recovery where the injury is willful or wanton. While that manner of treatment is perfectly consistent with the doctrine of 'last clear chance,' if the view herein suggested is correct, it is nevertheless calculated to mislead one, unless he keeps clearly in mind that the non-continuance of the plaintiff's negligence is an indispensable prerequisite of the doctrine. It would promote clearness of view if the courts in such cases, instead of passing over the intermediate steps and going directly to the doctrine of contributory negligence, would discuss the case from the point of view of the doctrine of 'last clear chance,' and show that while one of the indispensable prerequisites of that doctrine, namely, a breach of duty on defendant's part, occurring after the commencement of plaintiff's negligence was present, the other condition necessary to make the doctrine operate in plaintiff's favor, namely, the cessation of plaintiff's negligence at some time before the defendant's, was lacking, and, therefore, that the doctrine could not apply at all, or, if applied, would operate against plaintiff, because he, and not the defendant, had the last clear chance to avoid the accident."

In reviewing the Missouri cases, the learned editor at lower half col. 1, 451, says: "As already suggested, it is questionable whether the courts in this State have not in some cases applied the doctrine of 'last clear chance,' so as to hold the defendant liable where, if proper attention had been paid to the question as to continuing negligence on the part of the plaintiff, the application of the doctrine would have placed the defendant, or deceased, as the case may be, in the position of having by his negligence lost the clear opportunity to avoid the injury."

The conclusion to be drawn from all the authorities is that the humanitarian or "last chance" doctrine has no application, unless the negligence on the part of the plaintiff or deceased is to be regarded as having ceased before the termination of the defendant's negligence.

See also a discussion of *Davies v. Mann*, 1 Thomp. Neg., sec. 235, *et seq.* In section 237, Judge Thompson says:

"It is believed that these considerations fairly conduct us to the following rules: 1. If A and B have both been guilty of negligence contributing or tending proximately to produce the injury complained of, A cannot recover damages of B unless, *after discovering the exposed situation of A*, B could have avoided the consequences of A's negligence—that is, could have avoided the injury which took place—by the exercise of ordinary care. 2. One person is not bound to anticipate that another person, being *sui juris*, will negligently expose himself or his property to injury, and is not bound to make provision against the consequences of such negligence. Therefore, if A has negligently placed his person or his property in such a situation that B is liable to injure it in the exercise of his lawful business, and B, without discovering that A has done this, so injures it, B is not bound to pay damages to A, although at the time he committed the

injury he was not proceeding with ordinary care. The foundation of this rule was thus lucidly stated by PETERS, J., speaking for the Supreme Judicial Court of Maine: 'In cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant, *when the plaintiff cannot, and the defendant can, prevent the injury.* . . . But this principle would not govern where both parties are *contemporaneously* and actively in fault, and, by their mutual carelessness, an injury ensues to one or both of them.' This qualification of the rule is aptly illustrated by the case of a collision between a traveler and a train at a railway grade crossing. The traveler fails to exercise his faculties to discover the approach of a train, and those in charge of the train fail to give the proper signal on approaching the crossing. When he discovers the train on the one hand, and when the trainman discover him on the other, it is too late to avoid the collision. In such a case unless the doctrine of contributory negligence is abolished, there can be no recovery. The negligence of each is a proximate cause of the catastrophe; the negligence of one is just as near the catastrophe as that of the other. But the courts which adhere to the rule which requires knowledge on the part of the defendant of the exposed position of the person killed or injured as contradistinguished from the duty of knowing, maintain the theory that where one person negligently comes into a situation of peril before another can be held liable for an

injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury, or it must appear that the injurious act or omission was by design, and was such, considering time and place, as that its natural and probable consequences would be to produce serious injury."

This identical question came before this court in the case of *Sinclair v. Railroad*, 133 Mo. 233. It was there held that where the engineer sees that the trespasser is not informed as to his peril, it is the former's duty to give the latter a sufficient warning, and in time for him to leave the track in safety; and *that if the engineer performed that duty, the plaintiff could not recover, provided his negligence continued on down to the time of the injury.*

Judge MACFARLANE, in discussing that question, used this language:

"The instinct of self-preservation, as well as common judgment, impels one on a railroad track to leave it on the approach of a train. This law of nature is universal with intelligent beings. From this universal law is evolved the legal principle that persons in charge of a train have the right to presume that one walking upon the track will leave it in order to allow a train to pass if they have knowledge of its approach.

"Under the circumstances in which these parties were placed the immediate duty required of the engineer, when he saw that deceased was unaware of his peril, was to give a proper warning. This duty required such a signal as could have been heard and could not have been misunderstood; such an one would arouse deceased from his apparent mental abstraction or indifference to a sense of his danger, and the necessity of action on his part to avoid it.

"That such a signal was given is not denied, and is established by the evidence of many witnesses and is disputed by none. It was also the usual danger signal. It was heard all over the immediate neigh-

borhood. One witness, called by plaintiff, who was some distance from the place of the accident, described it as a sharp whistle, such as is given for stock on the track, and that it could have been heard two or three miles. The engineer cannot be charged with negligence as to giving a signal, nor as to its character and sufficiency.

“II. The next inquiry is whether the notice was timely. The engineer testified that he first saw deceased when about four hundred feet from him, and immediately gave the danger signal. If his testimony is true, then the charge of negligence in respect to giving the signal is met and refuted. There was no direct evidence that the engineer saw deceased sooner, nor is there a charge of negligence in failing to see. But the evidence shows that deceased was in full view of the engineer for about one-eighth of a mile, and from that circumstance, coupled with the duties of the engineer to his employer to keep a watch upon the track, a jury might infer that deceased was seen for more than four hundred feet. [Rine v. Railroad, 10 Mo. 235.] Assuming, then, that the engineer saw deceased as soon as he came in sight, when did his duty of care begin?

“Deceased was bound to know, and, in this case did in fact know, that a train was due behind him. It was his duty to keep a vigilant watch for it. Indeed, that duty is imposed upon all who go upon a railroad track. The engineer had the right to suppose, when he first saw him, that he would hear or see the train and leave the track.

“It was recently said by this court: ‘Defendant, of course, had the right of way, and was not bound to anticipate that persons trespassing on the track would not step aside before a coming train.’ [Hyde v. Railroad, 110 Mo. 279.]

“In another case it was said: ‘When plaintiff stepped on the track, it was the engineer’s duty to

warn him, and this he did. The engineer had a right to presume that an adult would at once step off the track and avoid danger. He was not required to stop his train until he saw plaintiff was in a position of danger or peril.' [Beardon v. Railroad, 114 Mo. 405.]

"In that case the court says further: 'The use of the steam brake immediately upon his entering upon the track would unquestionably have stopped the train, but whether it would after plaintiff had fallen and it became evident he was in peril, was, at least, a debatable question.'

"From these cases and many others that might be cited, it seems to be well settled that where no conditions intervene to confuse, or to prevent hearing a signal, and knowing its object, it will be sufficient if given in time for the trespasser to leave the track safely.

"The question then is, was the signal given in time to have allowed deceased opportunity to escape the danger. The engineer testified that the danger signal was sounded when the engine was about four hundred feet from deceased. Other evidence made the distance three hundred and forty feet. These are the maximum and minimum estimates. If the train was running twenty-five miles per hour, which was the estimated rate, it covered about thirty-six feet every second, or three hundred and sixty feet in ten seconds. If deceased walked at the rate of two and one-half miles per hour, he would travel about three feet a second, and thirty feet in ten seconds. Five feet would have taken him out of danger.

"McDowell, a witness for plaintiff, testified that while working about his barn he heard the whistle and thinking some of his stock was in danger he stepped around to a point from which he could see the train and deceased. It required about three steps in order to get the view. He saw deceased walking down the track as though he did not know the train was follow-

ing. After he got in sight the engine whistled two more times, the last of which was just as deceased was struck. After he came in sight of deceased he took three or four steps before he was struck. Even according to the evidence of this witness deceased must have walked fifteen or twenty feet after the danger signal was given. He had therefore ample time to have escaped the danger after the signal.

"The engineer was not, therefore, negligent in respect to his first duty on ascertaining that deceased was not aware of the approach of the train.

"III. The petition charges further that the engineer negligently failed and neglected to use the air brakes and other appliances ready and at hand for stopping the train. In other words, the charge is that the engineer was negligent in not stopping the train in time to avoid striking deceased. This duty of the engineer arose as soon as he knew, or by proper care ought to have known, that deceased did not regard the warning signal. The engineer on this question testified that after giving the signal, and observing that deceased did not heed it, he immediately put on the full force of the air-brakes, reversed his engine, and did everything in his power to arrest the speed of the train and stop it, continuing, at the same time, to sound the alarm whistle. His evidence receives some corroboration from the trainmen and some other witnesses. There was no direct contradictory evidence. One of plaintiff's witnesses who had been a locomotive engineer testified that the engine was reversed between the first and second whistles, and the air-brakes were on when the train stopped, but he did not know when the air was applied.

"The evidence tended to prove, though conflicting on the question, *that the engine ran five hundred and sixty feet after deceased was struck. The evidence*

also tended to prove that the train could have been stopped in six or seven hundred feet. From these facts the further fact that everything was not done that could have been done to stop the train might be inferred. But that is not the question. The question is whether the train could have been stopped in time to have avoided the calamity. If it could not and the collision was inevitable, unless deceased acted, then, though the engineer was negligent, it could not be attributed to defendant as the proximate cause of the disaster.

“When such dire results occur in so brief a period of time it is difficult to measure accurately either time or distance. Suppose the engine was three hundred and fifty feet from deceased when his duty to warn him arose, and the train was running twenty-five miles per hour, or say thirty-five feet per second. The engineer sounded the whistle and observed its effect. Say that occupied only three seconds, it could scarcely have been less. The train had then run one hundred and five feet nearer to deceased. Take two seconds more for applying the brakes and reversing the engine and the train moved seventy feet farther, before its motion could have been retarded. The engine was then within one hundred and seventy-five feet of deceased. Suppose it ran five hundred and sixty feet after it struck deceased, the stop would have been made in seven hundred and thirty-five feet, a very little over the shortest estimated distance. But, conceding that the train could have been stopped in six hundred feet, it is perfectly clear that the life of plaintiff's husband could not have been saved by anything the engineer could possibly have done toward stopping the train, for, at most, he had only four hundred feet in which to do it. We must, therefore, conclude that no negligence on the part of defendant was shown.

"IV. This conclusion obviated the necessity of considering the contributory negligence of deceased after the signal was given. *It was certainly his duty to leave the track immediately on hearing the signal and not to depend upon the engineer to stop the train. If by reason of a neglect of that duty he was caught on the track his contributory negligence would defeat his recovery though the engineer was also guilty of negligence in not stopping in time to avoid the collision.* The character of the signal was such that in the quietness of that afternoon, and the surroundings, we can conclude it was heard. The evidence also shows that deceased was struck within thirty-five feet of the point at which he would have left the track. It shows further that after the signal was given deceased changed his course from the center of the track in a diagonal direction toward the left rail, and when struck was outside the rail. These facts show conclusively that the signal was heard by deceased. His subsequent conduct indicates that he miscalculated the distance it was from him, and thought he had time to reach the footpath by which he intended to leave the track, or that he had time to walk off deliberately. One or the other of these conclusions must be drawn. In either case there would be contributory negligence.

"We are of the opinion that the evidence shows no liability, and the judgment is reversed. All concur."

The same rule was announced by this court in the case of *Prewitt v. Eddy*, 115 Mo. 283. GANTT, P. J., on page 303, in speaking for the court said:

"In *Fielder v. Railroad*, 107 Mo. 645, we held that the facts of that case showed that the engineer saw the girl for six hundred feet, and that he sounded the alarm (at a distance of thirty-five feet); that the girl gave no sign of having heard it. We held that she was then in peril, and as a reasonable man he should have

then checked his train. (Train running twelve to fifteen miles per hour in St. Louis.)

"In *Boyd v. Railroad*, 105 Mo. 371, the plaintiff's husband stepped upon the track of a railroad running through the town of Renick immediately in front of a train running forty miles an hour. The evidence tended to show that he both heard and saw the train. BRACE, J., in writing the opinion of the court, says there were two explanations of the conduct of deceased. One was that 'dominated perhaps by the first impression received in the house when he heard the whistle, that this was the regular mail (which as a hotel-keeper he was in the habit of meeting) he hastened toward the depot and onto the track without stopping for a moment to test by sense of sight or sound the correctness of his first impression, and as the result of his heedlessness lost his life.' The other view, that 'he may have miscalculated his own speed and that of the train and hazarded the chance of getting across the track in safety before the engine could strike him. In either view his death was the result of his own negligence.' And says: 'It must be conceded that if the defendant's liability in this case is to be limited, as in all similar cases heretofore it has been, to want of care on the part of its servants after they discovered, or by the exercise of reasonable care might have discovered, the deceased in a perilous situation, the plaintiff's evidence wholly failed to make out a case.' See cases cited. The learned judge concludes the case with the observation, '*Unless the doctrine of contributory negligence is to be entirely discarded, and engineers required to be such expert psychologists as to be able to read the minds of men and know before hand when a man in the possession of all his mental faculties is going to act in a way other than could be expected of an ordinarily prudent man, there was no evidence to take this case to the jury.*' "

The same question was again presented in *Hogan v. Railroad*, 150 Mo. 36, and on page 55, MARSHALL, J., in speaking for the court, said:

“Where both parties have been guilty of negligence, which directly contributed to cause the injury, there can be no recovery, for the courts never undertake to sever, apportion and discriminate between two directly negligent acts so as to decide which act caused the injury. There is no comparative negligence in this State. . . .

“The rule that the negligence of the plaintiff which contributes directly to the cause of the injury will prevent a recovery, is without exception or qualification. [*Dunkman v. Railroad*, 16 Mo. App. 548; *Ibid.*, 95 Mo. 232; *Craig v. Sedalia*, 63 Mo. 417; *Barton v. Railroad*, 52 Mo. 253.] Where the negligence of the plaintiff directly contributed with that of the defendant to produce the injury, there can be no recovery. [*Murray v. Railroad*, 101 Mo. 236; *Kellny v. Railroad*, 101 Mo. 67.] So if the negligence which produced the injury is mutual, the plaintiff can not recover. [*Packet Co. v. Vandergrift*, 34 Mo. 55; *Callahan v. Warne*, 40 Mo. 131; *Corcoran v. Railroad*, 105 Mo. 399; *Daugherty v. Railroad*, 97 Mo. 647; 7 Am. & Eng. Ency. Law (2 Ed.), p. 371, etc.]”

And in *Tanner v. Railroad*, 161 Mo. 497, BRACE, P. J., in discussing the same question, said:

“As there was some evidence tending to prove that train number ten coming in on track number two was running at a rate of speed exceeding the maximum rate prescribed by the city ordinance, and that its bell was not being rung, the court committed no error in sending the case to the jury, unless by these undisputed facts such contributory negligence on the part of the plaintiff is shown, as to preclude a recovery. That it is so shown is a conclusion as to which reasonable minds cannot well differ. The plaintiff, an adult in possession of all his faculties, familiar with the place,

the time and movement of these trains, without looking or listening or paying any attention thereto whatever, deliberately placed himself in the line of danger of train number ten, coming in on track number two, on time, and is struck, when by looking he could have seen, and by listening he could have heard that incoming train, and have avoided the danger to which he thus voluntarily and unnecessarily exposed himself. A clearer case of contributory negligence could not well be made out. The only shadow of an excuse for such negligence is that he had heard that the bulletin said both trains were on time, and if this was so, then number nine having just come in, number ten would not be in for seven minutes. Hence he paid no attention to his danger from that train. He took no care whatever to verify this report, did not even look at his watch for that purpose. If he had, he would doubtless have discovered that number nine was in fact late, and that number ten was then nearly due. However that may be, while bulletins are required by law, and serve useful purposes, they can at best do more than predict, suggest a probability, as to the arrival of trains, and no man has a right to shut his eyes, close his ears and put himself in a place of danger on or near a railroad track on the faith of such a forecast. No reasonably prudent man will do so. Hence it must be held that the plaintiff was guilty of such contributory negligence, in being within the danger line of track number two, when he was struck, as to preclude a recovery, and that the court committed error in sending the case to the jury, unless after the plaintiff had thus put himself in a place of danger, the conduct of the defendant's employees in the management of the train was characterized by such willful, reckless, or wanton disregard of human life, as that the defendant shall not be heard to say that the plaintiff was guilty of such negligence. [Morgan v. Wabash Ry. Co., 60 S. W. 195; Kellny v. Mo. Pac. Ry Co., 101 Mo. 67.] We

have looked in vain through all the evidence in this voluminous record for indicia of such willful, reckless or wanton disregard of human life upon the part of defendant's servants. There was barely evidence enough to take the case to the jury on the main issues tendered by the plaintiff, and while there was some evidence from which the jury might have found that the train came into the depot grounds at a rate of speed slightly in excess of that prescribed by the ordinance, there is none to indicate a reckless rate of speed. It is also true that there was ample evidence from which the jury could have found that the place at which the plaintiff was struck was plainly visible to the defendant's operatives on the engine, a sufficient distance for them to have safely stopped the train before it reached that place. But conceding all this, what would have been seen by the defendant's servants at that place? No person on track number two on which the train was moving. The plaintiff and several other persons on the platform between that track and track number one, on which train number nine was standing, presumably prudent persons having a proper regard for their own safety, and if any of them were within the line of danger from the approaching train, that they would be on the lookout for it, and would step out of its way as it approached them, and leave the way clear, and hence there would be no necessity for stopping the train on their account before reaching the usual stopping place some two or three hundred feet distant, where it did stop. This would have been the conclusion of an ordinarily prudent manager of the movement of such a train, and the defendant's servants thus managing the train in question cannot be convicted of a willful, reckless or wanton disregard of human life in not stopping the train before it reached the place where plaintiff was struck, because, forsooth, he proved to be an imprudent person without a proper regard for his own

safety, and did not step out of the way of the train, as he might easily have done, and as he would have been reasonably expected to do. The demurrer to the evidence ought to have been sustained."

And again BRACE, J., in the case of Sharp v. Railroad, 161 Mo. 214, at page 237, said: "Of course it is impossible to say exactly at what distance the engineer discovered the exact situation of the deceased in regard to the danger line or at exactly what distance from him the engineer gave the danger signal. But conceding that the situation of the deceased could have been discovered at such a distance as to have suggested the propriety of giving the danger signal sooner than it was given, and that it might have been sounded oftener than it was, there was nothing in the situation that seemed to imperatively demand that it should have been sounded sooner or oftener, and certainly nothing in the whole conduct of the engineer on the occasion that could be characterized as a willful, wanton or reckless disregard of human life, such as is necessary to take the case out of the general rule, that contributory negligence precludes a recovery. The court erred in overruling the demurrer to the evidence, and for this error the judgment will be reversed. All concur."

And in an earlier case, BRACE, J., said: "It will thus be seen that it was a physical impossibility for the deceased to have failed to see the approaching train, if he had looked in that direction, as it was his duty to do, while yet in a place of safety, and before entering upon the line of danger. Had he done so, there can be no question that he could and would have stopped his team until the train passed, and then crossed over in safety. But for some unexplained reason he failed to do so. And thus it is, though the defendant may have been negligent in failing to give the signals for the crossing, and in permitting the high grass to be upon its right of way, yet the deceased hav-

ing lost his life through his own negligence in failing to discharge the duty imposed upon him by law, in his situation, the plaintiff cannot recover for his death. This conclusion we find to be irresistible after a very careful examination of all the evidence, in the consideration of which every reasonable inference in favor of the plaintiff has been made. Consequently we cannot find that the trial court committed error in sustaining the demurrer to the evidence and in refusing to set aside the nonsuit." [Hayden v. Railroad, 124 Mo. 573.]

In the case of *Zumault v. Railroad*, 175 Mo. 288, BURGESS, J., in a learned and exhaustive opinion, on pages 311 to 313, in speaking for the unanimous court, in his usual clear and forceful manner, said:

"It is asserted by defendants that plaintiff was guilty of contributory negligence. Contributory negligence is defined as 'a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' [7 Am. & Eng. Ency. Law (2 Ed.), 371; *Montgomery Gas Light Co. v. Railroad*, 86 Ala. 372; *Moakler v. Railroad*, 18 Ore. 189; *Woodell v. W. Va. Improvement Co.*, 38 W. Va. 23.]

"'If the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof.' [Cooley on Torts (2 Ed.), 674.] The law will not permit a recovery where the plaintiff by his own negligence has contributed to produce the injury from which he has suffered. 'And it matters not whether the contribution consists in his participation in the direct cause of the injury, or in his omission of

duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong.' [Little v. Hackett, 116 U. S. 371.]

"The record discloses that plaintiff, a man of mature years, in possession of all his faculties, with good eyes and hearing, familiar with the movements of trains, and, while momentarily expecting the arrival of one at the station upon which he intended to take passage, took a position on the platform so near the railroad tracks that a train could not pass without striking him, turned his face to the east when he was expecting a train from the west, and either fell asleep, or from some other cause became entirely oblivious to his surroundings, when by looking he could have seen the approaching train, or by listening he could have heard it. If such conduct was not under the circumstances contributory negligence, then the definition before given is inaccurate, for it clearly falls within it. In fact it is in effect admitted by counsel for plaintiff in his brief, that plaintiff was guilty of negligence in sitting upon the platform in the position he was in when struck, but plaintiff claims, that, notwithstanding his negligence, defendant's servants and employees in charge of the train could have avoided injuring him by the use of ordinary care and diligence, such as sounding the danger signals or stopping the train after they saw him, or could have seen him in a perilous position, and having failed to exercise such care and diligence that he is entitled to recover for the injuries sustained by him by reason thereof.

"There was no evidence tending to show any willful, wanton or reckless disregard of human life on the part of the engineer in charge of the train that caused the injury.

"The engineer was plaintiff's witness and testified that he was at his post of duty, and keeping a

lookout ahead of him. His train did not stop at this station, nor was any train due there at that time which carried passengers, so that he was not expecting any person to be on the platform, having no reason to anticipate their presence there. He testified that the first thing he discovered going to Elmdale was a man sitting on the platform with his head very low between his legs; he was facing the track, and was a foot or two from the end of the platform; that just about the time he saw him he struck him; was not over ten or fifteen feet from him when he first saw him, maybe not that much; that as soon as he saw him he applied the air; that he did nothing else, because he had no time until the engine struck him; that there was nothing to obstruct his view except plaintiff was sitting in the shade of the platform; that after he saw the man he could do nothing to stop the cars except to put on the emergency brakes which he did.

"In this case the contributory negligence of the plaintiff is a complete defense to the action, unless the conduct of the servants of the defendants managing the train was characterized by such willful, wanton or reckless disregard of human life also contributing to his death as that the defendants ought not to be heard to say that the plaintiff was guilty of such negligence."

Again in the case of *Schmidt v. Railroad*, 191 Mo. 215, at page 235, GANTT, J., in speaking for the court, said:

"Notwithstanding the conclusion we have reached, it is proper to note the contention of counsel for the plaintiff that the facts of this case bring it within the principle of *Harlan v. Railroad*, 65 Mo. 22, in which it was said: 'When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable, if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable, if by the exercise of reasonable care, after a discovery by defendant of

the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when by the exercise of ordinary care would have discovered the danger and averted the calamity.'

"In our opinion the foregoing excerpt is inapplicable to the facts of this case. The engineer did not fail to discover the deceased near to and approaching the track, nor did he fail to discover the danger to the deceased by reason of any recklessness or carelessness on his part, but the testimony shows that he was keenly alive to the situation and immediately upon coming in sight of the deceased, sounded the alarm whistle and caused the bell to ring continually until he was struck. He had a right to presume that a mature person in broad daylight would not recklessly walk on a railroad track immediately in front of a rapidly moving train, and therefore, he only considered deceased was in peril when he discovered that in spite of the danger whistles and the ringing bell, the deceased indicated he was about to step on the track, but there is no foundation for saying that the engineer failed to discover this condition by reason of his reckless running. While the speed of his engine was in excess of that prescribed by the ordinance, it was in no sense reckless. It was the usual rate maintained at this point and the brake was set and the speed was being lowered to stop at the station. The engineer and fireman were both at their post observing the track. The statement quoted from *Harlan v. Railroad*, 65 Mo. 22, has no reference to such a state of facts as was developed in this case. Nor is this a case where a traveler has relied upon the presumption that the employees were obeying the law or ordinance and not running in excess of the speed prescribed and has on that account been caught on the track. This, as already said, is a case where a pedestrian has walked upon a railroad track in broad day-

light without even looking to see if a train was approaching and when, if he had looked, it would have been a physical impossibility for him to have failed to see the train. There can be no presumption in the teeth of the facts developed in this case that the deceased looked for a train. If he looked he saw the train, and if he saw it, he recklessly and negligently put himself in front of it and was killed, when one step backward or the refraining of taking one step would have wholly averted his injury and death. The negligence of the deceased was *concurrent in point of time with the negligent running of the train and was the direct proximate cause of his death.*

"We can only account for the conduct of the old gentleman on the ground that he had become oblivious to his surroundings and was wholly unconscious of his situation.

"From whatever point of view we look at this record, we can but say that the deceased was negligent and that his negligence contributed to his death.

"It results that the circuit court erred in not sustaining the demurrer to the evidence and directing a judgment for the defendant, and its judgment is accordingly reversed. All concur."

In *Holland v. Railroad*, 210 Mo. 338, BURGESS, J., again speaking for the court, said:

"It is ruled in *Harlan v. Railroad*, 64 Mo. 480, that every person who goes on a railroad track, or purposes to cross it, must use his eyes and ears to avoid injury, and that every intelligent person who has arrived at years of discretion is presumed to know that it is dangerous to be on a railroad track when trains are passing to and fro, and when crossing one is expected to be vigilant and watchful of the approach of a locomotive. Failure to exercise such vigilance is negligence *per se*. These familiar principles have been many times announced by this court. [*Taylor v. Railroad*, 86 Mo. 457; *Prewitt v. Eddy*, 115 Mo. 283; *Baker*

v. Railroad, 122 Mo. 533; Lane v. Railroad, 132 Mo. 4; Schmidt v. Railroad, 191 Mo. 215, l. c. 228.]

“Plaintiff, however, says that John Holland had the right to presume that defendant’s train would not be run at a greater rate of speed than five miles an hour, and to act upon such presumption until he knew, or by the exercise of ordinary care ought to have known, to the contrary. The only evidence with respect to the speed of the train at the time of the accident was the testimony of the fireman, and, as stated before, he testified that the train was not then running at a rate of speed exceeding five miles an hour. In all of the cases relied upon by plaintiff as supporting her contention, namely, Hutchison v. Railroad, 161 Mo. 246; Eckhard v. Railroad, 190 Mo. 593; Riska v. Railroad, 180 Mo. 168; Weller v. Railroad, 164 Mo. 180, there was evidence tending to show that the train was running at a rate of speed in excess of that fixed by ordinance, or there was a failure to observe the requirements of the ordinance in some other respect. But even if the train in question was running at the time of the accident at a rate of speed in excess of that prescribed by the city ordinance (which we do not concede), and the defendant was, therefore, guilty of negligence *per se*, *the conduct of the deceased in going upon the track in proximity to the approaching train was contributory negligence on his part, which negligence was the proximate cause of the injury.*

“In Schmidt v. Railroad, *supra*, it is said: ‘The rule of contributory negligence is not changed or abrogated by reason of a statute or ordinance imposing the duty on account of the violation of which the injury resulted. [Weller v. Railroad, 120 Mo. 653.] The statute does not absolve persons approaching a public railroad crossing from exercising common prudence to avoid danger, nor shift the responsibility to another should injury ensue from the failure to exercise it. [Kenney v. Railroad, 105 Mo. 284.]’ The same rule is

announced in the following cases: Boyd v. Railroad, 105 Mo. 381; Sweeney v. Railroad, 150 Mo. 396; Moore v. Railroad, 176 Mo. 546; Evans v. Railroad, 178 Mo. 508; Ries v. Railroad, 179 Mo. 1.

“There is no escaping the conclusion that the deceased saw the approaching train. He must, therefore, have been absorbed in other matters, or have misjudged the speed of the train and determined to take the risk of being caught by it before he could cross the track. But, whatever may have induced his action, his conduct can only be characterized as the grossest recklessness. The demurrer interposed by the defendant to the evidence should have been sustained. The judgment is reversed. All concur.”

In Felver v. Railroad, 216 Mo. 195, LAMM, J., expressly recognizes the doctrine that mutual and concurring negligence are fatal to plaintiff's recovery, and that unless after the engineer saw or might have seen that she was in a position of peril and *would not extricate herself therefrom*, she could not recover. In his clear and inimitable style he stated the rule as follows:

“‘Although you may believe from the evidence that the death of the plaintiff's husband was caused by defendant's negligence, yet if you further believe from the evidence that the deceased was guilty of negligence in driving upon the railroad track, and such negligence was concurrent with that of defendant, your verdict must be for the defendant.’

“The court refused it in that form but amended it by inserting before the words ‘your verdict’ the words ‘and that deceased's negligence in being upon the track was the proximate cause of his death’ and gave it as modified. Complaint is made of the modification. Of this complaint we observe: The instruction was properly refused at the outset. The law of the concrete case had been given on behalf of defendant in its eighth instruction, viz.:

“Lyman A. Felver, the deceased husband of plaintiff, was required under the law to exercise ordinary care—that is, such care as a reasonably prudent person under like circumstances would have exercised for his own safety, and unless he did so, the plaintiff cannot recover.

“It was his duty before driving on or so near the track as to be struck, to look and listen for passing cars, and unless you shall find from the evidence he did both look and listen, and looking could not see, or listening could not hear, the approaching car, then plaintiff cannot recover and this is true even though you may believe that the car was being run at a rapid rate of speed and the gong was not sounded; unless you shall further believe that after the motorman saw or might have seen that Felver, the deceased husband of plaintiff, was in a position of peril and *would not extricate himself therefrom, he had time to have stopped* the car before striking the wagon, with due regard to the safety of the passengers and negligently failed to do so, and unless you so believe, your verdict will be for the defendant, and on this issue the burden of proof rests upon the plaintiff.’

“The sixth instruction could only have the effect of bothering the jury in trying to reconcile its verbiage with the eighth. But counsel argue that, as given, it was bad and held out a false light to the jury. They say it told the jury that decedent’s contributory negligence before it could operate as a defense must be the proximate cause of his death. They say that is not the law. That the correct rule is that where the negligence of decedent directly contributed with that of defendant to produce the injury there can be no recovery. [Hogan v. Railroad, 150 Mo. l. c. 55, and authorities cited.] *True it is that if there is mutual concurrent negligence in both parties there can be no recovery.* True, there is no comparative negligence in this State. True it is that concurrent negligence, that is, coinci-

dent in time and place, defeats recovery. But this case, as said, proceeds on the assumption that Mr. Felver was guilty of an antecedent act of negligence. It proceeds on the assumption that if defendant, after it had the last clear chance, neglected under the humanitarian rule to see his peril and avoid his injury by the exercise of ordinary care, then there should be a recovery. Keeping that distinction sharply in mind, while the amendment in terms was unhappy in the use of learned terminology, yet we cannot see how it materially affected the merits of the case when considered with defendant's eighth instruction, and with the whole trial theory of the case.

In *Laun v. Railroad*, 216 Mo. 563, at 578, GRAVES, J., said:

"Plaintiff's evidence is divisible into two classes, i. e., some witnesses say that deceased did not look until he got on the main track, or at least their language might by a strained construction be so construed, whilst others say he stopped and looked east, while he was between the two tracks. Grant it that deceased did not look for an approaching train until he was in fact upon the main track, what is the status of the plaintiff's case? If deceased failed to look and listen for an approaching train then he was guilty of negligence which would bar plaintiff's recovery, although the defendant was at the time guilty of negligence in running in excess of ordinance speed. Such has always been the rule in this State. In *Schmidt v. Railroad*, 191 Mo. l. c. 228-9, we said: 'The pivotal point upon which this case must turn is, did the circuit court err in overruling the demurrer to the evidence? That the train was running in excess of the rate of speed prescribed by the ordinance of Jefferson City is conceded and established by the testimony of the defendant's own engineer and fireman, as well as that of the plaintiff's witnesses. Such conduct on the part of

the railway company was negligence *per se*, but notwithstanding this neglect of the regulations in regard to the running of trains within the city limits on the part of railroad employees, the question still remains, was not the deceased's own contributory negligence the proximate cause of his death?

"It is a settled law of this State that a person who goes upon a railroad track or proposes to cross it, must use his eyes and ears to avoid injury. And while a neglect of the regulations in regard to the running of trains amounts to negligence in law on the part of the railway company, this does not absolve pedestrians and others who propose to cross the tracks from the exercise of ordinary care. Every intelligent person who has arrived at years of discretion is presumed to know that it is dangerous to be upon a railroad track when trains are passing to and fro, and when crossing one, he is expected to be vigilant and watchful of the approach of the locomotive. The failure to exercise such vigilance is negligence *per se*." [Harlan v. Railroad, 64 Mo. 482.]

One of the clearest statements of the law made by this court, to which my attention has been called, governing the respective rights and duties of railroad companies and trespassers walking upon their tracks is found in the case of Woods v. Railroad, 188 Mo. 229. On page 248, VALLIANT, J., in discussing those questions, said: "If the jury came to the conclusion, on the defendant's own testimony, that, after the engineer saw and realized the plaintiff's danger, he could, by the exercise of ordinary care, have averted the accident with the means at hand, yet failed to do so, we are not prepared to say that their verdict was unwarranted. But we rest the case on the proposition that there was substantial evidence on the part of the plaintiff to justify the submission of the case to the jury on the hypothesis that the plaintiff's foot had become fastened in the cattle-guard and she had fallen

before the train came in sight and that the defendant's servants saw her in peril and could have stopped the train in time to have averted the accident but neglected to do so."

And again on page 257 to 258 we find the following:

"The plaintiff's case by her pleading, proof and instructions is based on the law as expressed by this court through BRACE, J., in *Kelley v. Railroad*, 101 Mo. l. c. 74, as follows: 'We know of but one exception to the rule that where an injury is the product of the joint concurring acts of negligence of both plaintiff and defendant the plaintiff cannot recover, and that is an exception made, on grounds of public policy and in the interest of humanity, to prevent and restrain, as far as may be, a willful, reckless or wanton disregard of human life or limb, or property, under any circumstances, and that is when the injury was produced by the concurrent negligent acts of both plaintiff and defendant, yet if the defendant before the injury, discovered or by the exercise of ordinary care might have discovered the perilous situation in which the plaintiff was placed by the concurring negligence of both parties, and neglected to use the means at his command to prevent the injury, then his plea of plaintiff's contributory negligence shall not avail him. This exception proceeds not upon the theory that the defendant has been guilty of another and independent act of negligence which is the sole cause of the injury and which must be charged as a separate and independent cause of action, but upon the ground that the negligence he was then in the very act of perpetrating was characterized by such recklessness, willfulness or wantonness as that he shall not be heard to say that the plaintiff was also guilty of contributory negligence.'

"The case concedes the plaintiff's negligence and asks to recover only on the ground that the defend-

ant's servants saw, or should have seen, her peril, and after becoming aware of it failed to avert the injury which they could have done with the means at hand if they had used ordinary care. That is the purport of the plaintiff's instructions, and the jury were authorized to give her a verdict only on satisfactory proof of such case. And the substance of the instructions given for the defendant was that the verdict should be for the defendant unless such case was proven; that if instead of the conditions asserted by the plaintiff the *facts were that the girls were walking or running on the track when the train came in sight, the engineer gave the whistle of alarm which they disregarded and instead of stepping off as they could have done continued to run in front of the coming engine and attempted to cross the cattle guard and plaintiff got her foot caught when the train was too close to be stopped in time although the engineer did his best to do so, then the verdict must be for the defendant.*"

Fox, P. J., announced the same rule in the case of *Brockschmidt v. Railroad*, 205 Mo. 435; and there are a score or more of other cases where this court has expressed similar views. Among which is *Everett v. Railroad*, 214 Mo. 54.

Now, if we apply the rule announced in the foregoing decisions to the case at bar, which it seems to me we must, then it is perfectly clear that plaintiff must be denied a recovery, for the reason that she was guilty of the grossest recklessness in climbing over defendant's cattle-guards, thereby trespassing upon its enclosed right of way and walking down its track a quarter of a mile without looking or listening for approaching trains, though full grown and possessed of all of her faculties, when she was perfectly familiar with the surroundings, and well knew that trains passed there hourly and were liable to approach her at any time. This reckless conduct of hers confessedly continued down to the very instant of the ca-

Dutcher v. Railroad.

tastrophe; and even though it be conceded for the argument's sake that the defendant was in the first place guilty of negligence in not stopping the train, or slackening its speed, still that concession would avail her nothing, for the reason if that was true her negligence concurred with that of the defendant in point of time and place, and her injury necessarily was the result of their mutual negligence, which has always constituted a bar to a recovery in this, as well as in other states.

The evidence is uncontradicted that defendant sounded the regular crossing whistles at both the Terrill and Headinghouse crossings, which she could have heard had she been listening and paying proper care for her own safety. Everyone else in that vicinity heard them, and many of them were much further away. Both the engineer and fireman who were in charge of the engine which struck plaintiff testified that the bell was rung and the danger whistle was repeatedly sounded from the time they first had reason to apprehend she was not going to leave the track until she was struck. The engineer also testified that he first gave the danger signal when he was about six hundred feet from plaintiff and kept it up until she was struck, and there is no direct evidence which contradicts either of those witnesses, and none other for that matter except the deductions drawn by counsel for plaintiff from the comparative speeds of the two trains, before mentioned, which are entitled to but little weight, for the reason pointed out in a previous paragraph, and for the additional reason that opinions formed regarding the relative position of trains running at full speed in opposite directions, and as to the rate of speed of each, at best rises but little, if any, above the dignity of pure conjecture, especially when formed in the midst of a catastrophe when all eyes and attention are riveted upon the unfortunate victim thereof, as was the case here.

By so viewing this record it practically stands undisputed that plaintiff was repeatedly warned of her perilous position by the blasts of the whistle and the ringing of the bell from the time the engine got within six hundred feet of her down to the moment she was struck.

A score or more of other persons who were no more favorably situated than was the plaintiff heard these signals, and doubtless she could and would have done so had she been exercising ordinary care and reasonable prudence for her own safety. But whether she did or not is wholly immaterial in so far as defendant is concerned, for it discharged its full duty toward her by timely warning her of her perilous position.

If the train which struck plaintiff was running thirty miles an hour, which the evidence tended to show, then at the time of the injury it was running at a speed of about forty-four feet to the second, and consequently it must have taken about fourteen seconds for it to have run the six hundred feet just prior to striking her; and if the plaintiff was walking at an ordinary gait of four miles an hour, then she was moving about six feet a second, and consequently she must have walked down the track about eighty feet while the train ran said six hundred. Had she during that same time turned to the right or left, and that, too, without changing her gait, she would not only have cleared the track and been in a place of safety, but would have been about seventy-five feet either east or west of it when the train passed. This not only shows that the defendant gave her timely warning, but also proves that she was at least guilty of contributory negligence which directly contributed to her injury, if not guilty of the sole negligence which was the proximate cause thereof.

We are therefore, of the opinion that under no view of the case was the plaintiff entitled to a re-

covery, and for that reason the trial court should have sustained the demurrer to the evidence.

There are many other propositions presented and discussed by counsel for both plaintiff and defendant, but the conclusions before announced render it unnecessary to pass upon them.

The judgment of the circuit court should be reversed, and judgment here rendered for defendant.

THE STATE ex rel. WILLIAM K. BIXBY, ROBERT BROOKINGS and MAX KETANY v. CITY OF ST. LOUIS and FREDERICK H. KREIS-MANN, Mayor.

In Banc, March 20, 1912.

1. **FORMER DECISIONS: Authority: Limited to Facts.** The language used in any opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case. General language is not to be disconnected from those facts and issues and applied mechanically or automatically to the different facts and issues of another case. The reasoning, illustrations and references contained in an opinion are not authority or precedent, but only the points arising in the particular case and which were decided by the court are.
2. **———: Void Proviso: Decision Limited to That: Museum of Fine Arts: Taxation.** The case of State ex rel. Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 216 Mo. 47, was directed to holding invalid the proviso in section 3 of the Act of 1907, which turned over to a self-perpetuating board of an auxiliary branch of Washington University the tax authorized by the act to be levied and collected, and was not meant to hold and did not hold that the whole act was void, if the administrative board to manage the fund was appointed by the mayor in the manner provided by the words of that section preceding that proviso. It was not held in that case that the act was passed for the mere purposes of the proviso, that is, that the tax was to be levied and collected for the use of the board of control of the St. Louis School of Fine Arts, which was an auxiliary assistant to the board

of Washington University. The effect of that decision was that the taxes so collected could not be turned over to that board of control, which was the relator, suing for the fund in that case. The case is *stare decisis* only to the point of holding the proviso unconstitutional. The rest of the act was not held in judgment in that case.

3. **UNCONSTITUTIONAL LAW: Invalid in Part: Presumption.** The presumption that where a law is unconstitutional in part the whole is invalid, is of doubtful existence. On the contrary, the court approaches the constitutionality of every law with a strong, even a violent, presumption that it is valid; and if the invalid part is separable from the rest, the presumption is that the rest is valid.
4. ———: **Museum of Art Tax: Proviso Invalid: Rest Valid.** The Act of 1907, authorizing the city of St. Louis to levy and collect a one-fifth mill tax for a public art museum, and providing that when said act shall have been approved by a vote of the people the mayor, with the approval of the municipal assembly, shall appoint an administrative board of nine members to control the expenditure of the art museum fund, is this far constitutional; but the proviso, namely, that if there be already in such city a legally constituted administrative board of public property devoted by law to the uses of an art museum (referring, as a matter of fact, to an existing board of control of an art museum which had become a part of Washington University), "such board and its successors shall be the board of control of the art museum," and have and expend the public tax, is invalid. But it cannot be said that the proviso furnished the whole legislative inducement for the act, and the invalid proviso being separable from the rest, and ancillary thereto, the rest is valid and constitutional; and it is the duty of the city, since the act has been approved by the people, to levy the tax, and of the mayor to appoint an administrative board.
5. ———: **Meaning Ascertained from Title.** The title of a law is of significance in getting at its intentment; and the consistency between the title and the main body of the act is important in determining whether the whole was made to depend on a proviso contained in a single section
6. ———: **Vicious Intentment.** In getting at and enforcing the intentment of the lawmaker the courts will not hold his intentment to be vicious or his law as amounting to nothing at all, unless driven thereto by imperative reasons.

Mandamus.

WRIT AWARDED.

A. & J. F. Lee, and Charles M. Polk for relators.

(1). Relators have a right to maintain this action. *State ex rel. v. Hoblitzelle*, 85 Mo. 625. (2) The mayor has a discretion to say who shall be appointed but not to say whether a board shall or shall not be appointed. *Laws 1907*, secs. 1, 2 and 3, pp. 94, 95, 96; *State ex rel. v. Francis*, 95 Mo. 56; *State ex rel. v. Jones*, 155 Mo. 576; *State ex rel. v. Public Schools*, 134 Mo. 311; *High on Extraordinary Legal Remedies*, sec. 324, 325; 26 Cyc. 251; *Kelly v. Van Wyck*, 35 Misc. N. Y. 210; *Laud v. Lynd*, 44 Pa. St. 336. (3) The mayor does not enjoy immunity from judicial control like the Governor of a State or the President of the United States, and the city can be compelled by mandamus to levy and collect the tax imposed by law. *State ex rel. v. Noonan*, 56 Mo. App. 528; *State ex rel. v. Gates*, 190 Mo. 546; *State ex rel. v. Rainey*, 74 Mo. 236; *State ex rel. v. Trustees*, 61 Mo. 158; 26 Cyc. 320; *State v. Patton*, 108 Mo. App. 26; 26 Cyc. 330; *Brooks v. Schultz*, 178 Mo. 222. (4) No ordinance of the city is necessary to carry into effect the Act of 1907, for that Act is automatic. *Tharp v. Biscuit Co.*, 179 Mo. 553. (5) The Act of 1907, *Laws 1907*, p. 94, is constitutional. 20 Am. & Eng. Enc. Law (2 Ed.), 1218; 20 Am. & Eng. Enc. Law (2 Ed.), 1221; *State v. Board of Education*, 141 Mo. 550; *State ex rel. v. Field*, 119 Mo. 614; *State ex rel. v. Owsley*, 122 Mo. 68; *State ex rel. v. Mason*, 153 Mo. 43; *State ex rel. v. Mason*, 155 Mo. 499; *State ex rel. v. County*, 144 Mo. 275; *State ex rel. v. Holliday*, 70 Mo. 137; *State ex rel. v. County Court*, 34 Mo. 546; *Hauessler v. St. Louis*, 205 Mo. 656. (6) The constitutionality of the Act of 1907, was not passed upon in the case of *State ex rel. Board of Control of the St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47. *County Court v. Griswold*, 58 Mo. 99; *State v. Railroad*, 89 Mo. 44; *Carroll v. Campbell*, 108 Mo. 550; *Water Co. v. Neosho*,

136 Mo. 510; *Kansas City v. Bacon*, 147 Mo. 273; *Haag v. Ward*, 186 Mo. 339; *State ex inf. v. Ins. Co.*, 152 Mo. 49; *Cooley on Constitutional Limitations* (7 Ed.), p. 246.

Lambert E. Walther for respondents.

(1) The Act of 1907 is unconstitutional and was so held by this court in the case of *State ex rel. v. City of St. Louis*, 216 Mo. 47. (2) Where part of an act has been declared invalid and the remaining portion comes up for consideration as to whether it can stand as an independent proposition, the presumptions are generally against it. *Skagit v. Stiles*, 10 Wash. 388. (3) Even though the portion of an act declared invalid be distinct and separable from the remainder of the act, yet if it be apparent that the Legislature would not have passed the remainder without the invalid portion, then the whole act falls with the invalid part. *Sutherland's Statutory Construction* (2 Ed.), sec. 302; *Enderlich on Interp. of Stat.*, sec. 538; *State ex rel. v. Nast*, 209 Mo. 708; *Ex parte Smith*, 231 Mo. 111; *State ex rel. v. Railroad*, 195 Mo. 228; *State ex rel. v. Donsman*, 28 Wis. 541; *Eckerson v. Des Moines*, 137 Ia. 480; *State ex rel. v. Bd. of Sup.*, 62 Wis. 376. (4) "If by striking out a void exception, proviso or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent and the whole would be made void by the invalidity of such part." *Sutherland on Stat. Constr.* (2 Ed.), sec. 306; *Copeland v. St. Joseph*, 126 Mo. 147; *Connolly v. Pipe Co.*, 184 U. S. 540; *State ex rel. v. Bd. of Sup.*, 62 Wis. 376; *Mathews v. People*, 202 Ill. 389.

LAMM, J.—*Mandamus*. Original proceeding. On final submission the cause stands on relators' motion for judgment on the pleadings.

Relators (hereinafter called plaintiffs) sue as residents and taxpayers of St. Louis in their own behalf and in behalf of all persons of like kind and situation desiring to join and share the expense. Complaining of respondents (hereinafter called defendants), they charge that the Forty-fourth General Assembly enacted a law (approved March 7, 1907, Laws 1907, p. 94) with the following title: "An act providing for the establishment, extension and regulation of museums of art, in cities of four hundred thousand inhabitants or more, or which may hereafter have four hundred thousand inhabitants or more, and authorizing taxation for the same, with emergency clause." Pleading the provisions of that act, they state that, as therein provided, an election was petitioned for, ordered and held in St. Louis; that thereat, to-wit, at the regular city election in April, 1907, the voters of the city (by a vote of 27,721 for, as against a vote of 7606 against) voted a one-fifth mill tax for a public art museum; that subsequently plaintiffs requested and demanded of defendant city and its officials that they fix a rate for such art museum tax and make a levy thereof as authorized and provided in said Act of 1907, and by the voters of the city at said election, keeping the total taxes within the constitutional limitation upon the taxing power; that the city and its officials failed and refused to accede to such demand and request; further, that plaintiffs made a demand and request at the same time that defendant mayor appoint and submit to the legislative branch of the municipal government for its approval an administrative board of nine members to control the expenditure of the art museum fund and otherwise to perform the duties prescribed by the act for said board to perform, and that then and ever since defendant mayor failed and refused so to do; that plaintiffs, being otherwise remediless in the premises, pray an alternative writ of mandamus issue to defendants to show

cause, if any they have, why such board should not be appointed and submitted for such approval and why said tax should not be levied.

An alternative writ issued, narrating the allegations of the petition, and defendants were cited to show cause.

Replying to that citation defendants make return in effect confessing the allegations of the alternative writ, and for cause of their failure to appoint the board and levy the tax, plead that the Act of 1907 is unconstitutional and void, that its unconstitutionality has been declared by this court in a cause determined here entitled: "The State ex rel. Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis." [*Vide*, 216 Mo. 47.]

Plaintiffs' counsel, doubtless on the maxim that abundant caution does no injury, and being without the gift of prophecy and, therefore, in the dark on the scope and tenor of defendants' ultimate position, file here a memorandum brief supporting their right to a writ. That memorandum brief has been carried forward as live matter in their printed brief on final submission. Among others, that brief asserts and cites authorities to sustain the following propositions:

(a) Plaintiffs have a right to maintain this action.

(b) The mayor has a discretion to say who shall be appointed, but not to say whether a board shall or shall not be appointed.

(c) The mayor does not enjoy immunity from judicial control like the Governor of a State or the President of the United States, and the city can be compelled by mandamus to levy and collect the tax imposed by law (and the vote of the people).

(d) No ordinance of the city is necessary to carry into effect the Act of 1907, for that act is automatic.

By the brief of the learned chief law officer of the city, Mr. Walther, defendants raise no issue at all on propositions "a," "b," "c" and "d." Such form of submission in a controversy presented to a court must be taken as a conclusive confession that defendants admit propositions thus advanced and not controverted, and fall back on a flank attack by way of avoidance. The city and its mayor admit the passage of the law, the election, the result, the demands and their failure, and that relief is due in the form prayed unless the law is worthless because of invalidity. The cause, then, may proceed with such confession assumed, and we shall waste neither time nor labor examining or ruling propositions not controverted. In fact defendants, as was meet and proper under the circumstances, put all their eggs in one basket, as appears not only in their return but in their statement of the case, the latter summing up the whole controversy as hanging on a single thread, viz.:

"The respondents contend that this act is unconstitutional and was so declared by the Supreme Court of the State of Missouri in the case of *State ex rel. Board of Control of the St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47, and that therefore there is no authority for the doing of the acts commanded by the alternative writ.

"Relators say that only the proviso of section 3 of the Act of March 7, 1907, was declared invalid by this court, and that the proviso is separable from the remainder of the act, and, if eliminated, that there is still left a complete constitutional enactment."

The question then is: Is the Act of 1907 constitutional? Plaintiffs affirm and defendants deny that it is. Defendants affirm and plaintiffs deny that the constitutionality of the act was passed upon in the mentioned case. Let us deal with the last issue first.

I. Of the decision in *State ex rel. Board of Control of the St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47.

(a) As leading up to a determination of the scope and effect of that decision a foreword will not be unprofitable. There is a pronounced line of demarcation between what is *said* in an opinion and what is *decided* by it—between arguments, illustrations and references on one side and the judgment rendered on the other. The language used by a judge in his opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case precisely as in every other human document. Let us put a homely case to illustrate. Once upon a time there was kept, screwed against an end of each car on a certain railroad, a sealed cabinet or case with a glass front. In this case were conspicuously displayed an ax, a hammer and a saw. The glass front bore the legend in bold letters: “In case of accident break this glass.” Suppose John, a passenger, accidentally stubbed his toe in a hole in the aisle carpet of that car and hurt himself, would he have leave and license to smash that glass on the invitation extended by the general language of the legend? Would not the accident giving that right connect itself with the necessary need and use of a hammer, a saw or an ax?

It would be a wide and very mischievous departure from correct canons of interpretation to disconnect general language from the issues and facts of a given case and to apply that general language mechanically or automatically to the different facts and different issues of another case; for the sense must be limited according as the subject requires, and words take color from their context. In the House of Lords in *Quinn v. Leatham* (Appeal Cases 1901, l. c. 506) the Earl of HALSBURY, Lord Chancellor, said: Now, before discussing the case of *Allen v. Flood* and what was decided therein, there are two observations of a

general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. The other is that the case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition which may seem to follow logically from it."

Vattel's 18th rule of interpretation reads: "The connection and train of the discourse, is another source of interpretation. We ought to consider the discourse together, and in order perfectly to conceive of the sense of it, and to give to each expression not so much signification as it may receive in itself alone, as that it ought to have from the thread and spirit of the discourse." [Potter's Dwarrris on Stat. and Con., 128.]

The doctrine of a standard treatise (2 Lewis's Suth. Stat. Const. (2 Ed.), sec. 486) runs agreeably to the dictum of Lord Chancellor HALSBURY, viz.: "The maxim of *stare decisis* applies only to decisions on points arising and decided in causes; it has been held not to extend to reasoning, illustrations and references in opinions. The precedent includes the conclusion only upon questions which the case contained, and which were decided." That exposition has been adopted as satisfactory by this court. [Koerner v. St. Louis Car Company, 209 Mo. l. c. 156.]

In a closely reasoned case, *Lucas v. Commissioners*, 44 Ind. l. c. 541, DOWNEY, C. J., uses language often approved, to-wit: "It may be well to state . . . that the language used in an opinion is always to be restricted to the case before the court, and the decision is only authority to that extent. The reasoning, illustrations and references contained in the opinion

of the court are not authority, not precedent, but only the points arising in the particular case and which are decided by the court. The members of a court often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in other cases. The reasoning adopted, the analogies and illustrations presented in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur, or they may not. So of the principle concurred in, and laid down as governing the point in judgment, so far it goes or seems to go beyond the case under consideration. If this were not so, the writer of the opinion would be under the necessity in each case, though his mind is concentrated on the case in hand, and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations and qualifications which every variety of facts and change of phase in causes might render necessary."

There is general language in *State ex rel. v. City of St. Louis*, *supra*, somewhat urgently calling for the use of the foregoing rules for sifting and applying decisions. That general language is quoted and relied on by defendants in the instant case. Such use of that general language makes pertinent the foregoing discussion and justifies the remark that it is in the light of those rules, and not otherwise, we must determine what that case actually does decide.

To the above, and giving further point to the observations just made, we add that the law department of the city of St. Louis construed the decision in hand as cutting away the Act of 1907 root and branch. The city, following the enabling vote referred to, had levied

a one-fifth mill tax, collected a large sum and put it in an "art museum fund." When that decision went down the city made no further annual levy of said one-fifth mill tax, and, for aught appearing here, it now has such fund intact in its money chest. Not only so but a committee selected for learning in the law, revising the statutes in 1909, and empowered in that behalf to omit those declared by this court unconstitutional, omitted the Act of 1907 from Revised Statutes 1909, thereby joining the law department of the city in construing our decision as fatal to the enactment from end to end.

(b) To aid in getting an understanding of the points ruled in the decision invoked by defendants, a summary of the Act of 1907 will be helpful. Thus: Its title hereinbefore set forth we shall recur to presently. The Act is in ten sections—the tenth, of some significance, declares an emergency because of "the fact that many cities and towns in this State have no art museum established therein."

Section 1 enables a city of a given population (including St. Louis) on petition to take a vote on the question whether a one-fifth mill tax for an art museum shall or shall not be levied. Its mandate is that, on such enabling vote, the tax shall be levied and collected in like manner as other general city taxes—the proceeds to be segregated and known as "the art museum fund"—its continued levy, however, is subject to recall at a subsequent election and on such recall the tax ceases. The tax rate of the city is to be so fixed that, including the art museum tax, constitutional taxing limitations shall be observed.

Section 2 prescribes, by way of definition, what the art museum shall be in subserving a beneficial end to the public. It is to be an institution to collect and exhibit pictures, statuary and other works of art, or whatever else may be of artistic interest or appro-

priate for exhibition in such museum "for instruction in art, and in general, for the promotion by all proper means of aesthetic or artistic education." It next prescribes certain administrative requirements.

Section 3 we reproduce entire, since its clause (in the nature of a proviso) beginning with the phrase "unless and except," is said to contain the poison causing the whole enactment to perish. It reads:

"When in any city it shall have been decided by vote in the manner provided in section 1 of this act that a tax shall be levied for an art museum, the mayor of such city shall, with the approval of the legislative branch of the municipal government, proceed to appoint an administrative board of nine members to control the expenditure of the art museum fund, *unless and except* there shall be at the time already constituted and in existence, operation and authority, an administrative board endowed by city ordinance or other legal authority with power to occupy or administer public property devoted by law to the uses of an art museum located in a public park or upon public property by virtue of municipal authority; and if there shall be such a board, such board and its successors shall be the board of control for the art museum fund under this act for all the purposes and possessing all the powers and charged with all the duties provided for such board in this act."

Section 4 provides for the term of office of the administrative board to be appointed by the mayor, and gives directions for filling vacancies, for removal from office, etc.

Section 5 empowers said board to make certain by-laws and donates other powers.

Section 6 directs that any museum so established shall be forever free to the use of the inhabitants of the city "so long as the art museum tax shall continue to be operative therein," subject to reasonable rules and regulations by the board.

Section 7 relates to certain duties of the board.

Section 8 authorizes the city legislature to enact ordinances imposing penalties to punish those injuring the museum, its contents or grounds.

Section 9 provides that well disposed persons may make loans or donations of art objects, etc., to the art museum by deed, gift, devise or bequest to be held in trust, etc.

With the provisions of the Act of 1907 in mind, let us look to the decision in *State ex rel. v. St. Louis*, upon which defendants lean as a staff. In that case the board of control of the St. Louis School and Museum of Fine Arts came here for a writ of mandamus to compel the city of St. Louis to turn over \$85,000, then in the city treasury as the proceeds of the one-fifth mill tax theretofore levied and gathered in for an art museum, and to go on and make continued tax levies to go the same way. Relators contended their board was the legal receptacle into which those taxes must be emptied and that they were entitled to that relief because they came directly within the purview, meaning and requirements of the "unless and except" clause or proviso of sections 3 of the Act of 1907—that they filled the bill of that proviso and were an administrative board (to use the verbiage of the act) already constituted and in existence, operation and authority, endowed by a certain city ordinance and by the act itself with power to occupy or administer public property devoted by law to the uses of an art museum located in a public park or upon public property by virtue of municipal authority. The issues raised by that claim were the only issues that could be properly threshed out and determined in that case. We ruled that the board was not entitled to the fund or to compel such tax levies and, in doing so, ruled the proviso unconstitutional. In leading up to those rulings the opinion gives the origin and history of the St. Louis School and Museum of Fine Arts,

considers a certain ordinance 19969, of the city authorizing its board of control to erect in a public park of the city a building to be devoted to art education, and considers the meaning of the proviso in connection with the claim of relators in that suit.

A proposition decided in that case was that the board of control of the St. Louis School and Museum of Fine Arts was not in fact and could not become (giving heed to trusts involved) a public municipal institution, but was a mere department or administrative agency of Washington University, a corporation chartered by the State many years ago. In other words that neither under the ordinance of the city referred to, nor by the ordinances and resolutions of Washington University shown to exist, nor by the Act of 1807, nor by the instruments, agreements and authorized powers by which Washington University took over and controlled the St. Louis School and Museum of Fine Arts, did that school and museum or its board of control become, nor could either or both of them ever become an entity separate and distinct from Washington University. It was further held that the board of control of that school and museum was not and could not become a public official body of the city of St. Louis amenable to municipal government. On such premises it was ruled, further, that such board of control could not, under pointed-out provisions of our Constitution, be entitled to a donation of taxes levied and collected for public purposes, and to compel the levy of such taxes.

It was ruled further that relators, not being a legal entity or corporate body, but only an agency and department of Washington University administering the trust created by Mr. Crow, had no legal capacity to sue as such board.

Unquestionably it was decided, as said, that the proviso of section 3, looking to turning over the tax to

the board of control of the St. Louis School and Museum of Fine Arts, was unconstitutional. Although that case was decided by a divided court we stand by the ruling so made. Nor do relators in the present case ask us to change that ruling. They agree that we ought not to be blown about by every wind of doctrine on that score.

It may be conceded there is now and then some language used in the opinion (somewhat *arguendo* we think) that is subject to the construction that the Act of 1907 was passed for the very purpose of the proviso. If that be so, then to that extent the infirmity and vice of the proviso permeate the whole law. But the constitutionality of the whole act was not involved in the issues raised and decided, *ergo*, under the rules for interpreting and applying decisions announced in paragraph "a," that language ought not to be held as a decision that the entire act was void so as to make the maxim *stare decisis* apply. Such question is an issue in this case, but, as said, not in that. To such situation the rule of Lord Bacon applies, viz.: A court has nothing to do with what is not before it (*nihil habeat forum, etc.*) The general language on which the idea seems to be predicated that the whole act was declared void appears to have been casual, argumentative and by way of a side step into *obiter*. It does not arise to the dignity of a solemn holding on full consideration that the act was bad throughout. We find the following language at the close of that opinion, which either has no place there at all or bears out the view by way of a surmise, a hypothesis (or a benediction), that there may be virtue left in the law—a virtue to be tested out in a proper case by right parties in the interest of the public, viz.: "It may be that the city of St. Louis by its municipal assembly may provide a museum in its public parks which shall be under control and direction of the municipal authority of said city and that a portion of the revenue of the city may be

devoted to building it up." That language does not indicate that the court was precluding a future contention that the entire act was not void.

The conclusion announced brings us to the final question, to-wit: The proviso being void, does the whole act fall? To that question we pass.

II. We shall not undertake to re-examine or reformulate the learning on the question. The books are full of it and counsel on both sides cite cases decided by this court, and text-writers, showing under what circumstances an unconstitutional and therefore dead provision may be pruned from the main stem of a law without impairing the stem itself. The prying mind can consult the reporter's head notes for them. There is a very late case, *State ex rel. v. Gordon*, 236 Mo. l. c. 170, *et seq.*, where the matter was in judgment and the right doctrine is announced. Briefly, the touchstone whereby a correct conclusion is to be reached will be found in correct answers to these questions: Is the entire law built up around the unconstitutional proviso? Are all the provisions of the enactment inseparable, and so interwoven and connected as to be interdependent? Does the statute attempt to accomplish instead of two objects (one valid, the other invalid) only, one object and that one invalid? Does the proviso furnish the inducement, the consideration, the legislative motive for the whole act? Is it apparent that but for the proviso the Forty-fourth General Assembly would not have enacted the law? With the proviso cut away is there left only an incomplete enactment, one not symmetrically rounded out and, therefore, incapable of enforcement? If those questions must be judicially answered, yes, then the whole act falls to the ground with the proviso—if, no, then the law, bad in part, may be good in part; for the courts in this behalf do not apply the ideas shadowed forth in the metaphors of Paul and Solomon where the one speaks

of a little leaven that leaveneth the whole lump, and the other comments on the all-pervading and unsavory effect of dead flies in the apothecary's ointment.

We are cited to a case (*Skagi County v. Stiles*, 10 Wash. 388) holding that where a part of the law is bad the presumption is generally that the whole is bad. Such a presumption I think of doubtful existence and of little value if existing at all. To the contrary we approach the constitutionality of a law with a strong, even a violent, presumption it is valid. Its invalidity must be made to appear beyond a reasonable doubt and every allowable art, part and act of judicial power should be exercised in so interpreting the law, if possible in reason, that none of it perish by construction. But if that be impossible and some of it, through inherent vice, must perish, do not the separable and independent parts of the law still stand protected by the presumption of validity attending the whole law at the outset? Why not? To a little alter and use a simile of Lord, HOBART (*Malever v. Redshaw*, 1 Mod. 35), which I have had occasion to use before in another form, a judge is not to be like a tyrant, making all void when part is void, but like a nursing father, making void only that part where the fault is and preserving the rest if he can.

We are all of one accord in the opinion that the proviso being cut away as unconstitutional, there was left remaining a perfect, constitutional law capable of enforcement; that the proviso did not furnish the whole legislative inducement and consideration for the law; that there is no apparent reason why the Legislature would not have passed the law without the invalid proviso; that there is a main purpose running like a marking thread through the warp and woof of the law and a perfect plan outlined to effectuate that purpose, independent of the proviso; that the proviso is in its nature ancillary, a mere incidental or possible means of effectuating the main purpose of the law,

if, and only if, conditions were found to exist bringing the incidental or ancillary scheme into play; that the enactment may be likened unto a channel in which water runs, the proviso likened unto a canal tapping that channel and taking that water, whereby if the sluice gate be lowered and the canal be dammed at its head, the water naturally takes the main channel again.

As said by Grotius, the more noble, useful or necessary the matter of one provision is than that of another, the greater weight ought that provision to have with us.

Here the single motive or purpose of the enactment appears first blazoned forth in the legislative inscription or title over the law. Whatever the rule in England, in Missouri the title of a law is of significance in getting at its intendment. [Sedalia ex rel. v. Smith, 206 Mo. l. c. 361, *et seq.*] The title to the Act of 1907 shows that the legislative purpose was to enable cities of a certain class to establish, maintain, extend and regulate museums of art and employ their taxing power to that end—a worthy and permissible municipal end whether the educational efforts be directed to advance the “fine arts” so called, or “decorative art” or both. Turning to the emergency clause it shows that the Legislature was impressed with the fact that cities of this State had, at the time in hand, no free public art museums. Turning to the body of the act there is abundant internal evidence that its broad and main purpose, uninterrupted from head to foot, was to supply that deficiency, and that there is a perfect administrative working scheme provided, as said, to that end. True it is, that scheme or administrative plan is tentatively (and only tentatively) halted or diverted at one point on one contingency, viz.: the contingency evidenced by the “unless and except” proviso in section 3—a contingency that never happened and never can happen. Why then (the premises considered and keeping in mind the pur-

pose of the law), if the proviso be taken away, as here, should not that purpose and main scheme to carry it out remain intact and operative for the public good?

Speaking further to that proviso, we are of opinion that when the whole act is construed together, it shows that the Legislature had in mind that there might exist a present administrative board, endowed in a certain way with powers of a certain kind, that might be borrowed to carry out the purpose of the law and its administrative scheme, and, to that end, have and hold the powers and perform the duties prescribed for the other statutory board, to-wit, an administrative board of nine members to be appointed by the mayor and confirmed by the legislative branch of the municipal government. As the force of the decision in Board of Control of the St. Louis School and Museum of Fine Arts v. St. Louis was directed to and spent in ruling that relators in that case (a self-perpetuating body) were not such administrative board as could validly take over those powers, or become the donee of public money and perform the function of public municipal officers, entrusted with public property, and that the proviso was a dead letter, it results, as said, that the principal provisions of the act, outlining another administrative scheme, at once come into active play and resume their full operative force, as soon as the ancillary or incidental means of effectuating the purpose of the law were struck down and out of the way; for we are not by speculative refinements, in getting at and enforcing the intendment of the law-maker, to hold his intendment vicious, or his law as amounting to nothing at all, unless we are pricked on and goaded thereto by imperative reasons—reasons we cannot find in the case at bar. It was a long time ago tartly and shrewdly said by a very great Judge, by way of *reductio ad absurdum* may be, in a kindred matter, that “the court, in its anxiety to find out the meaning of testator, has found that what he said has the

same meaning as if he had said nothing at all." [Wright v. Atkins, 1 Turn. and Russ. 143, l. c. 156.] We should not unnecessarily get into such a pickle in interpreting either a law or a will.

So, the proviso may be likened in its nature to a *permission*, the rest of the law showing what is *prescribed*. In such case, the rule is: Where what is only permitted is found incompatible with what is prescribed, the latter has the advantage. [Vattel's 36th rule.]

Let a final writ go. It is so ordered. All concur.

JEREMIAH FRUIN et al. v. MAGGIE O'MALLEY
et al., Appellants.

Division Two, March 21, 1912.

1. **APPEAL: Agreed Statement: Matter of Exception.** Agreed statements of facts, in cases instituted by petitions, are mere matters of evidence, and do not become a part of the record unless incorporated in a bill of exceptions.
2. ———: **Exceptions: Separate Finding of Facts.** Under the statute (Sec. 1972, R. S. 1909) both the special findings of facts and conclusions of law should be entirely separate from the judgment, in order that the party excepting to such finding may except to the "decision of the court on the conclusions of law or equity arising in the case," which means that such exceptions to the court's conclusions of law shall be saved as may be properly included in a bill of exceptions. The law does not contemplate that exceptions shall be written into the record proper.
3. ———: ———: **No Bill of Exceptions.** In an action at law, where there was a special finding of facts, which is not made a part of the judgment, and no bill of exceptions was filed, there is nothing for review on appeal but the record proper, and a separate finding of facts is not a part of the record proper; and if the judgment is legally sufficient within itself, and the petition legally sufficient to support the judgment, that judgment will be affirmed. But if there is an error on the face of the judgment, that error will be corrected.

Fruin v. O'Malley.

4. ———: Correcting Judgment: Wrong Rate of Interest.
Where the judgment in a case to foreclose a lien for special taxbills issued in payment of a street improvement in St. Louis, on its face shows that it bears interest from the date of its rendition at eight per cent, that judgment will, though there is no bill of exceptions, be so corrected as to make it bear six per cent interest.

Appeal from St. Louis City Circuit Court—*Hon. D. G. Taylor*, Judge.

AFFIRMED (*as modified*).

Frank C. O'Malley for appellants.

George D. Harris for respondents.

BROWN, J.—Action at law to foreclose lien for special taxbills issued for street improvements. From a judgment of the circuit court of St. Louis City awarding to plaintiffs a lien as prayed in their petition, defendants appeal.

In seeking a reversal of the judgment of the trial court, the defendants attack not only the validity of the contract under which the improvements were made, but also the constitutionality of certain parts of the charter of St. Louis City authorizing and regulating the improvement of streets and the issue of special taxbills for such improvements.

Before considering the alleged invalidity of the taxbills, which defendants' resourceful attorneys have presented with much learning and industry, we must first determine whether or not the errors, if any, committed by the trial court have been brought here in such manner as to authorize a review by an appellate court.

The appellants have filed in this court what they term a printed abstract of the record, which embraces the petition, answer, reply, a special finding of facts by the trial court, the judgment, orders showing the

filing of a motion for a new trial, the overruling of same, and the granting of an appeal.

No bill of exceptions was filed. The motion for new trial is not included in the record; and the finding of facts is not a part of the judgment. That is, the judgment is complete without reference to the finding of facts; and there are no conclusions of law, unless we shall say that the judgment itself is a conclusion of law in that it declares that the plaintiffs are entitled to recover.

Respondents have also filed in this court what they term an "Additional Abstract of the Record," which is simply a printed copy of a stipulation entered into in the trial court agreeing upon certain matters of evidence to be considered by said trial court in ascertaining the facts in dispute and rendering its judgment.

Appellants have objected to this "additional abstract," on the ground that it was filed out of time. Regardless of when it was filed, it is clear that it has no place in this appeal. Agreed statements of fact in cases instituted by petitions are mere matters of evidence, and never become a part of the record, unless incorporated in a bill of exceptions; which was not done in this case. [State ex rel. v. Merriam, 159 Mo. 655; Smith v. Smith, 111 Mo. App. 683.]

The second point for our consideration is whether or not we can, without a motion for a new trial or bill of exceptions in the record, consider and review the alleged errors in the trial court's conclusions of law.

This point is not altogether free from difficulty. This court in an action at law has announced the doctrine that when a trial court makes its finding of facts a part of its judgment, such finding thereby becomes a part of the record proper; and may be reviewed on appeal without a bill of exceptions. [Snuffer v. Karr, 197 Mo. 182.] The Kansas City Court of Appeals has held that when a finding of facts is made, it becomes

a part of the record proper, and the judgment may be considered as the court's conclusions of law, and reversed, if it is not properly supported by the finding of facts. [Nichols v. Carter, 49 Mo. App. 401.] In a later case by the same court, it was held that a special finding of facts could only be made a part of the record by a bill of exceptions. [State ex rel. v. Lusk, 93 Mo. App. 680.] It is undoubtedly true that the judgment and all necessary recitals therein are matters of record proper, the same as the petition, answer and reply. If a judgment is not supported by a sufficient petition, it may be reversed on appeal, without any bill of exceptions. It is necessary for judgments to contain general findings of fact, and the judgment must follow those findings. For example, a judgment in favor of a plaintiff for one thousand dollars would be properly supported by a general finding of the court that the defendant was indebted to plaintiff in that sum; but in an ordinary action for debt, a general finding that defendant was indebted to plaintiff in the sum of one thousand dollars, would not support or authorize a judgment for two thousand dollars; and on appeal, such latter judgment would have to be reversed or modified, even though no bill of exceptions was filed.

Section 1972, Revised Statutes 1909, provides that: "Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it *with the view of excepting to the decision of the court upon the questions of law or equity arising in the case*, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law."

It is manifest that the foregoing section contemplates that when so requested, a statement or conclusion of the facts proven in the case, and the court's conclusions of law, as applied to such facts, shall be

written up and filed by the trial court. This statement of law and facts has no connection with the general findings which are usually recited in the judgment itself. Both the special finding of facts and conclusions of law should be entirely separate from the judgment, to the end that the party requesting such finding may except to the "decision of the court on the conclusions of law or equity arising in the case." This statute clearly means that such exceptions to the court's conclusion of law shall be saved as may be properly included in a bill of exceptions. The law never contemplates that exceptions shall be written into the record proper.

In actions at law, where the trial court makes a special finding of facts and both parties acquiesce in such finding by neglecting to except to the same as being contrary to or unsupported by the evidence, there is no reason why the losing party by excepting to the conclusions of law, as announced on and applied to such finding of facts, should not be allowed to have the errors in such conclusions of law reviewed by an appellate court, if he preserves his exceptions to such conclusions of law by a proper bill; and this he may do without bringing up the evidence on which such finding of facts is based.

A finding of facts in actions in equity stands upon an entirely different footing; for in that class of cases we may retry the whole case *de novo*, and disregard entirely the finding of facts and conclusions of law. [Fitzpatrick v. Weber, 168 Mo. 562.]

The case at bar is an action at law. The special finding of facts by the trial court was not a part of the judgment. This is disclosed by the action of the appellant in filing in this court a copy of the judgment which is legally sufficient within itself, and nowhere refers to the finding of facts. The defendants have not by bill of exceptions brought to our attention any errors of the trial court in the admission or exclusion

of evidence; nor in its conclusions or declarations of law. In fact, it seems no declarations or conclusions of law were given or made by the court or requested by either party. The petition is legally sufficient to support the judgment; and with the record in this condition, there is nothing for us to do except affirm the judgment of the trial court. It is so ordered. *Ferriss, P. J., and Kennish, J., concur.*

PER CURIAM.—The appellants, by motion for rehearing, call our attention to the fact that the judgment of the trial court in this cause entered on May 21, 1908, in favor of the plaintiffs for the sum of \$1377.88, bears interest from the date of its rendition at eight per cent per annum.

This is an error on the face of the record proper; and we have jurisdiction to correct the same, even in the absence of a bill of exceptions.

The judgment of the trial court will be modified here, so that it will bear interest at the rate of six per cent per annum, from May 21, 1908; and as modified, said judgment is affirmed. [Sec. 2983, R. S. 1909; *Gilsonite Roofing & Paving Company v. St. Louis Fair Association*, 231 Mo. 589; *City of Boonville v. Stephens*, 238 Mo. 339.]

ANNA M. DAVIS and CHARLES L. DAVIS, her
Husband, Appellants, v. A. W. RIEWE ARCHITECTURAL REALTY AND BUILDING COMPANY et al.

Division Two, March 21, 1912.

FRAUDULENT CONVEYANCE: Corporations: Payment for Capital Stock. R organized a corporation, of which he owned all but two shares of the stock, paying for the stock by conveying real estate to the corporation. His wife joined with him in conveying her homestead and dower interest in the property only upon agreement by the corporation that her interest should be reconveyed to her in other property whenever the homestead property should be sold by the company. After the corporation had become insolvent it conveyed the property in suit to a trustee for R's wife. *Held*, that the conveyance to the trustee was voluntary, without consideration and a fraud on the plaintiff, a creditor of the corporation. The corporation had no power to make any agreement to return any consideration paid for its capital stock.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED AND REMANDED (*with directions*).

F. A. & L. A. Wind and *F. X. Geraghty* for appellants.

The deed was fraudulent as against plaintiffs. (a) It was fraudulent in fact, under the evidence and without any consideration to the company. (b) If a valid agreement, such as is claimed could be shown by competent evidence, it would be a fraud upon the plaintiffs and other creditors of the corporation, to permit such agreement to be carried out when the corporation was hopelessly insolvent, after the company had obtained credit on the strength of its ownership of the property and without any notice to creditors of the secret agree-

ment. *Riley v. Vaughan*, 116 Mo. 169; *Singer Mfg. Co. v. Stephens*, 169 Mo. 1. (c) The corporation could not agree, nor could any officer or promoter, agree in its name to return any consideration paid for its capital stock. *Haskell v. Sells*, 14 Mo. App. 102; *Joy v. Manion*, 28 Mo. App. 60.

William Zachritz, A. R. Taylor and Morris Tucker for respondents.

(1) We contend that since the original agreement is founded on a valid and good consideration and the transfer to Mrs. Riewe was made in pursuance to that agreement, thereby fully executing the same, it is incumbent on the plaintiff to show by proper evidence: 1st. That Mrs. Riewe knew that the corporation, in transferring the property to her, intended to hinder and defraud the creditors. 2d. That she actually participated in the fraud. The plaintiff has wholly failed to prove either proposition. *Morgan v. Wood*, 38 Mo. App. 264; *Shelley v. Boothe*, 73 Mo. 74; *Albert v. Besel*, 88 Mo. 150; *Frederick v. Allgaier*, 88 Mo. 601; *Sexton v. Anderson*, 95 Mo. 379. The evidence conclusively shows that in transferring the property to the corporation under the agreement with its president, she became the first creditor of the corporation and that the corporation's indebtedness to her anteceded all other obligations. (2) A party can prefer a creditor and pay any valid indebtedness by sale of part of its assets in the absence of fraud. *Foster v. Mill Co.*, 92 Mo. 87; *Meyer v. Folding Chair Co.*, 130 Mo. 188; *Shufelt v. Smith*, 131 Mo. 280. (3) He who comes into a court of equity, must do so with clean hands. This is another, and we think controlling reason, both in law and equity, against the plaintiff. Without any dispute after she was given ample security for her debt, she, by arrangement with the president of the

corporation, failed and neglected to put her deed of trust on record.

ROY, C.—This is an action to set aside a conveyance as being in fraud of creditors. It was tried in the circuit court of the city of St. Louis, resulting in a judgment for defendants, from which plaintiffs appeal.

In October, 1904, A. W. Riewe organized and incorporated the A. W. Riewe Architectural Realty and Building Company, with an ostensible capital of \$50,000, of which he owned all but two shares.

Riewe paid for his capital stock by the conveyance to the corporation of a lot of real estate. His wife joined in the conveyance. The testimony of Mrs. Riewe and her husband is to the effect that at the time of that conveyance she owned an interest in the homestead which was part of the property conveyed. The title was in the husband. She had inherited about two thousand dollars and had made a thousand or fifteen hundred dollars by sewing and keeping boarders, all of which had gone into the property. She refused to sign the deed unless she should have the value of her interest in the homestead and the value of her inchoate dower interest in the other property reconveyed to her in other property whenever the homestead property should be sold by the company. In order to induce her to make that deed the company, acting through her husband, agreed to her proposition. She and her husband and son and Mrs. Prante testified to such a contract. She with her son went soon after to California and remained about eleven months. A part of the realty conveyed to the company was Riewe Terrace. On December 30, 1905, the company contracted with the plaintiff to build some flats for her to cost \$9800. She advanced it \$8000 on a note and deed of trust executed by the company. She did not record her deed of trust until June 9, 1906, by which time the

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property included therein had been incumbered to such an extent as to make her security worthless.

The homestead was sold in October, 1905, for \$5500, and on April 14, 1906, the property in controversy, subject to an incumbrance, was conveyed to Nettie Prante, a defendant, as trustee for Mrs. Riewe, the equity being worth about \$5500. At that time the company has hard pressed. It owed at least fifteen thousand dollars of unsecured bills and had no ready money. Its realty was incumbered, and soon thereafter was foreclosed. The corporation was clearly insolvent at the time of the transfer to Mrs. Riewe. There is no evidence that she knew at that time of the indebtedness to the plaintiff.

OPINION.

I. The corporation had no power to make any agreement to return any consideration paid for its capital stock, and of course no officer or promoter of the corporation had any such power. Nor had they any power to agree to turn that consideration over to a third party, even though that third party furnished that consideration. It stands conceded that the property conveyed by the joint deed of the husband and wife was made in payment for the capital stock of the corporation. Mrs. Riewe knew the corporation was being organized, and we have a right to infer that she knew that the property conveyed by her and her husband was in payment for the capital stock. Section 8 of article 12 of the State Constitution provides: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

In *Garrett v. Mining Co.*, 113 Mo. l. c. 339, it was held: "The contract that the corporation, when organized, should issue stock as fully paid up, when in fact the proposed payment was intentionally fictitious,

was an agreement that it would perform an act *ultra vires*, and which a court of equity will not enforce. [Tobey v. Robinson, 99 Ill. 233; Railroad v. Mowatt, 12 Jur., pt. 1, 407; Le Warne v. Meyer, 38 Fed. 191.]

Plaintiff and the other defendants who were parties to the illegal agreement stand *in pari delicto*, and neither can enforce the contract against the other. [Green v. Corrigan, 87 Mo. 370; Kitchen v. Greenbaum, 61 Mo. 116.]

As to the subsequent creditors, Mrs. Riewe was *in pari delicto* with her husband in making the contract, the effect of which was to reduce the act of payment for the capital stock *pro tanto* a mere sham and a fraud on such creditors. Such being the case, the conveyance of the property to her trustee in April was voluntary, without consideration, and a fraud on the plaintiff.

The judgment and decree is reversed and remanded with direction to enter up a decree in accordance with this opinion. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All the judges concur.

CAROLINE J. PEPPER, Appellant, v. ADOLPHUS S. PEPPER et al.

Division Two, March 21, 1912.

1. ORDER GRANTING NEW TRIAL: Not Preserved: Appellate Practice. Where the order granting to defendants a new trial is not set out in the record, the presumption will be indulged, on appeal, in favor of the court's action, and it will be upheld if sustainable upon any of the grounds of the motion for a new trial.
2. ———: Appellate Practice: Sustained by Substantial Evidence. Where under the facts and circumstances in evidence it cannot be said that there was no substantial evidence against

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the finding and decree of the court, the appellate court will not hold that the trial court erred in granting to defendants one new trial, where in their motion therefor they aver that the judgment is contrary to the evidence and that there is no evidence to support the judgment quieting the title in plaintiff.

3. ———: ———: Judgment on Merits. But where the appellate court has reached the conclusion that the trial court did not err in granting to defendants one new trial, it will not go further and review the case on the merits and direct the trial court to set aside the order granting a new trial and render judgment for defendants. There is no final judgment after the order granting a new trial was entered, and the appellate court's duty, on an appeal from that order, is to review only the court's action in granting the new trial.

Appeal from St. Louis City Circuit Court—*Hon. D. G. Taylor*, Judge.

AFFIRMED.

Jones, Jones, Hocker & Davis for appellant.

Joseph S. Laurie for respondents.

KENNISH, J.—This is an appeal from an order of the circuit court of the city of St. Louis, sustaining a motion for a new trial. The action was brought under section 650, Revised Statutes 1899, for the purpose of having the title of the parties to the suit ascertained and adjudged in and to the real estate described in the petition. Plaintiff is the daughter of Christian Peper, deceased, spoken of in the testimony as Captain Peper, and the defendants are the two sons and a daughter of the said Captain Peper, also the husband of the daughter defendant, and the wife of one of said sons.

The real estate in controversy is residence property in said city of St. Louis, particularly described in the petition, and of the value of about forty-two thousand dollars.

It is alleged in the petition, in short, that plaintiff is the equitable owner of the property described; that the said Christian Peper in his lifetime promised to buy a lot of ground in said city and improve it by building a suitable residence thereon and to give the same to plaintiff; that in the year 1898 the said Christian Peper did buy the lot described, built a residence thereon and gave the said lot and improvements to plaintiff; that plaintiff did then and there accept said property and entered into possession of the same and has retained possession thereof, adversely to every other person, until the institution of this suit, but that said Christian Peper died without having made a deed to plaintiff to said property. It is further alleged that in consideration for said property, plaintiff and her daughter were to entertain said Christian Peper by performing on the piano and by providing a place where he could visit and dine with plaintiff and her family daily; that these conditions were fully performed by plaintiff, and that plaintiff improved and beautified said lot with flowers, and fruit and ornamental trees, upon the faith of said gift, etc. The prayer is that the right, title and interest of the parties to the suit be ascertained and adjudged by the decree and judgment of the court.

The answer contains as defenses a general denial, a defense of the Statute of Frauds, and an affirmative defense alleging title to said property in Christian Peper at the time of his death; that said Christian Peper devised said property by his last will and testament to the parties plaintiff and defendant; and prays the court to adjudge the title of said parties thereto, in accordance with the provisions of said will; that having ascertained the title and interest of the parties, the court will order and decree partition and sale of the property, and that the proceeds be divided between the parties according to their respective interests, after deducting from plaintiff's share such

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sum as may be due from her as rent for the use and occupancy of said premises.

The reply was a general denial.

Plaintiff introduced evidence to prove these facts: Captain Peper was a very wealthy tobacco manufacturer, engaged in business in the city of St. Louis. He had long made his home in the outskirts of the city with his daughter, Mrs. Bell. His other daughter, the plaintiff, was a widow with two children, and for many years before his decease he had supported her and her family. Plaintiff lived nearer the business portion of the city than Mrs. Bell, and Captain Peper was in the habit of going from his place of business to plaintiff's home for his noonday lunch and remaining there for some time thereafter, listening to music and being entertained by the plaintiff and her daughter. In the year 1898 he suggested the purchase of a lot upon which to build a home for plaintiff. The latter selected the lot. A house was built thereon and furnished, all of which was paid for by the father. There was also testimony tending to prove that Captain Peper made statements to the effect that he was building a house for the plaintiff; that he was going to build a house for plaintiff and then he was going to build a house for his other daughter, Mrs. Bell; that he had built the house where his daughter lived and had given it to her. There was much testimony as to statements of the character of the foregoing.

On cross-examination the following facts were brought out: That as long as Captain Peper lived he had the property in controversy assessed in his own name and paid the taxes thereon, and that for several years after his decease such taxes were paid out of his estate. The legal title to the property was in Captain Peper at the time of his death, and when he made his will in August, 1903, being about two months before his decease, after a number of special bequests, it was provided in item six of the will that: "All the rest,

residue and remainder of my property of which I may die possessed of, and not hereinbefore disposed of, I will, bequeath and devise to my beneficiaries in Item III of this will absolutely, in the following proportions, to-wit," etc. Much of his real estate was devised in this clause of the will, and the defendants claim the property in suit was included. It was not specifically described in the will.

The inventory of Captain Peper's estate was made by his son, Frederick C. Peper, his executor, and the property claimed by the plaintiff in this suit was inventoried as a part of the estate. The said son Frederick, who made his home with plaintiff, paid rent to the estate on this property for several months after his father's decease.

Defendants introduced no testimony, and the court found in favor of plaintiff and entered a judgment and decree investing plaintiff with the absolute fee simple title to the property. Defendants filed a motion for a new trial, containing, among others, the following grounds, namely: "(1) The judgment on plaintiff's cause of action is not warranted by the pleadings or evidence; (2) said judgment is contrary to law; (3) said judgment is contrary to the evidence; (4) there is no evidence to support said judgment; (5) the evidence shows that plaintiff was not entitled to recover."

The court sustained the motion and granted the defendants a new trial, and from such order of the court the plaintiff appealed.

The bill of exceptions contains a direction to the clerk to insert the order of the court granting a new trial, but fails to set out such order; nor does it appear elsewhere in the bill. Therefore a presumption will be indulged in favor of the court's action, if sustainable under any of the grounds of the motion for a new trial. [Stoner v. Royar, 200 Mo. l. c. 451.] Indeed, it is recognized law that even if the order has been

fully set forth and the action of the court cannot be upheld upon the ground assigned by the court, but can be upon another ground, the judgment awarding a new trial will be affirmed. [Candee v. Railroad, 130 Mo. 142; Haven v. Railroad, 155 Mo. 216.]

The scope of the review in this court upon an appeal from an order granting a new trial has been considered in a large number of cases, and the rule is now established that: "An appeal from an order of the circuit court granting a new trial, brings only the ruling of the trial court on the motion for new trial to this court for review. The usual and immemorial practice here obtains in considering the sufficiency of the trial court's reasons for granting the new trial, to-wit, the appeal is here for review on matters of law, and not on the weight of the evidence, nor is this court to substitute its discretion for the discretion of the trial court." [Haven v. Railroad, 155 Mo. 216.] The rule is also stated in the case of Karnes v. Winn, 126 Mo. App. 712, as follows: "It is well established in this State that a trial court may, in its discretion, grant one new trial on the ground that the verdict is against the weight of the evidence and that appellate courts will not interfere except in cases where there has been an abuse of such discretion. [Haven v. Railway, 155 Mo. 216.] And the appellate court will not consider that there has been an abuse of such discretion in cases where there is any substantial evidence against the verdict. [Herndon v. Lewis, 175 Mo. 116; Bank v. Rogers, 100 S. W. 534, 123 Mo. App. 569.]"

Applying these rules to the facts of this case, our duty to affirm the order and judgment of the trial court is clear, for under the facts and circumstances in evidence it cannot be said that there was no substantial evidence against the finding and decree of the court.

Appellant and respondents have briefed and argued the case fully on the merits, and it is suggested

in respondent's brief that in case of an affirmance of the order of the trial court, this court should remand the cause with directions to enter a decree for affirmative relief in partition, in accordance with the prayer of respondent's cross-bill.

We are not favorably impressed with that view of our duty in the premises. The case is not before us on appeal from a final judgment on the merits. Our duty is to review the action of the trial court in granting a new trial. If the record presented a case in which such action disclosed an arbitrary exercise of discretion, without warrant of law, we could well reverse the judgment with directions to reinstate the decree or to overrule the motion for a new trial and enter the proper judgment. But we have held that the court, in granting the new trial, acted within the bounds of its discretion, and therefore there is now no final judgment in the case. Under such circumstances and state of the record this court would be encroaching upon the jurisdiction of the trial court if, in the absence of a final judgment, it attempted to direct a disposition of the case on the merits.

In the case of *Groves v. Terry*, 219 Mo. l. c. 599, a case in some features not unlike the case in hand, after sustaining the action of the trial court in granting a new trial, this court speaking through LAMM, J. said: "We have deemed it wise to let the case go down and take its own course without ruling on questions on the merits discussed by counsel—among others, whether affirmative relief could go to the extent prayed by defendants on their form of answer without getting beyond the scope of section 650. [*Powell v. Crow*, 204 Mo. l. c. 485.] We prefer to pass on vital questions when they come here, if ever, on an appeal from a judgment meeting the approval of a trial chancellor on a hearing in which all the facts are developed, and not by way of anticipation on a scant or ambiguous agreed statements of facts."

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We think the foregoing is sound law and is in point in this case. The case before us is one addressed to the appellate jurisdiction of the court, and that jurisdiction is invoked only in so far as it calls for a review of the action of the court in granting a new trial. When we have sustained such action, the case then stands in the trial court for a retrial. [Hurley v. Kennally, 186 Mo. 225.] -

Our conclusion is that the order of the trial court granting a new trial should be affirmed. It is so ordered. *Ferriss, P. J., and Brown, J., concur.*

Ex parte GEORGE RICHARD ZORN, Petitioner.

Division Two, March 21, 1912.

1. **INSANITY: Probate Court: Jurisdiction.** Probate courts have full jurisdiction to pass upon the sanity of persons brought before them to answer informations charging unsoundness of mind. The Constitution (Sec. 34, Art. 6) expressly authorizes probate courts to appoint guardians and curators for persons of unsound mind, and that power implies the power to pass upon the sanity of the person for whom such guardian or curator is to be appointed.
2. ———: ———: ———: **County.** The probate court of the county of the residence of the person alleged to be insane, and not that of the county in which he is being confined in a state hospital as a private patient, is the proper court to conduct the inquiry into the alleged insanity of such person.
3. ———: ———: ———: ———: **Process to Another County.** And the probate court of the county of such person's residence has jurisdiction to send its process to the county in which such person is confined and have it served there.
4. ———: ———: ———: **Process: General Statute: Section 3863.** Although the statute does not expressly authorize probate courts to send their notices or writs to other counties to be served upon persons sought to be declared insane, yet as

probate courts are a part of the judicial system of the State and are empowered by the Constitution to pass upon the sanity of persons, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law; and that has been done by Sec. 3863, R. S. 1909, declaring that "all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law."

Habeas Corpus.

WRIT DENIED.

L. R. Weiss for petitioner.

Rozzelle, Vineyard & Thatcher for respondent.

BROWN, J.—*Habeas corpus* instituted in this court on February 23, 1912, to secure the release of petitioner from Dr. C. R. Woodson's sanitarium in St. Joseph, Buchanan county, Missouri, where it is alleged he is unlawfully restrained of his liberty.

The sole issue in the case is the alleged invalidity of a judgment of the probate court of Jackson county, entered on October 29, 1909, adjudging the petitioner insane and appointing a guardian of his person and curator of his estate, under the provisions of article 19, chapter 2, Revised Statutes 1909.

When the information upon which petitioner was adjudged to be of unsound mind was filed, he was an inmate of the State Hospital for the Insane at St. Joseph, Missouri, where he had been placed as a private patient without any judicial determination that he was in fact insane. He was placed in the State Hospital by his stepfather, Dr. Louis Zorn, the same person who sued out the writ of *habeas corpus* in this case.

Since petitioner was adjudged insane and a guardian appointed for him, that guardian has caused him to be confined in Dr. C. R. Woodson's sanitarium; and if the judgment of the probate court of Jackson county declaring the petitioner to be insane is valid, then the

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petitioner must be remanded to the custody of Dr. Woodson; otherwise, he must be discharged.

The proceeding to have petitioner declared insane was instituted in Jackson county, because he owned property situated in that county and resided there before he was entered as a private patient at the State Hospital in Buchanan county.

Notice of the proceeding was issued by the probate court of Jackson county to the sheriff of Buchanan county, and by said sheriff duly served upon petitioner in that county. No appearance was made by or for petitioner before the probate court of Jackson county.

In this action the petitioner contends that the probate court of Jackson county possessed no jurisdiction to send its process to Buchanan county to secure service upon him; that there is no statute authorizing a probate court to send its process beyond its county and thereby acquire jurisdiction to adjudge parties insane who are outside of the county where the proceeding is instituted.

Learned attorneys for petitioner and Dr. Woodson have favored us with exhaustive briefs on every phase of the case; but we do not feel called upon to encumber this opinion with a review of all the authorities cited.

That probate courts have full jurisdiction to pass upon the sanity of persons brought before them to answer informations charging unsoundness of mind, cannot be disputed. Section 34, article 6, of our Constitution, expressly authorizes probate courts to appoint guardians and curators for persons of unsound mind. This power to appoint guardians for insane persons implies the power to pass upon the sanity of the persons for whom such guardians are to be appointed. This power is as clearly implied as is the power of the probate court to determine that a property owner

is dead before appointing an administrator for his estate.

We have no hesitation in holding that Jackson county was the proper place to conduct the inquiry into the alleged insanity of petitioner, because that county was the place of his residence. One of the objects of article 19, chapter 2, Revised Statutes 1909, is to protect and preserve the property of persons of unsound mind. This is evidenced by the fact that the proceeding cannot be instituted in the probate court if the insane person has no property. It is apparent that the Legislature intended that the guardians of insane persons should be appointed and their estates administered in the county of their residence where their property is located, and where their friends and acquaintances are likely to reside. [State ex rel. v. Wurdeman, 129 Mo. App. 263.] It is true that article 19, chapter 2, Revised Statutes 1909, does not expressly authorize probate courts to send their notices or writs to other counties to be served upon parties sought to be declared insane. Probate courts are part of the judicial system of our State, being created by the Constitution, and empowered by that document to pass upon the sanity of individuals; therefore, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law.

Article 1, chapter 35, Revised Statutes 1909, prescribing the powers and duties common to all courts of this State, contains the following section: "All courts shall have power to issue all writs which may be necessary in the exercise of their jurisdictions according to the principles and usages of law." [Sec. 3863, R. S. 1909.]

To the same effect is section 4061, Revised Statutes 1909, found in the law defining the power and jurisdiction of probate courts.

The foregoing statutory provisions are a complete answer to the contention of petitioner that there

is no statute under which the probate court may send its citation or other process outside of its county for service upon a party charged by information with being of unsound mind and incapable of managing his affairs.

If the guardian of petitioner is not performing his duty according to law, the remedy pointed out by section 522, Revised Statutes 1909, can be invoked; and if petitioner has been or shall hereafter be restored to his right mind, he may be released under the provisions of sections 519 and 520, Revised Statutes 1909. There is no such issue in this case.

Finding that the petitioner is restrained of his liberty by due process of law, the judgment of this court is that he be remanded to the custody of Dr. C. R. Woodson, at St. Joseph, in Buchanan county, Missouri. *Ferriss, P. J., and Kennish, J., concur.*

THE STATE v. HARRY CONWAY, Appellant.

Division Two, March 21, 1912.

1. **WITNESS: Coindicttee: Not Indorsed on Indictment.** A witness who was jointly charged by information with defendant, and whose name is not indorsed on the information, is competent to testify for the State in the separate trial of defendant, after a *nolle prosequi* has been entered as to such witness.
2. **BURGLARY AND LARCENY: Sufficient Evidence.** Where the evidence showed that both the burglary and larceny had been committed by some one, and a gold watch and two or three hundred dollars in money taken, and there is testimony that defendant was in possession of the watch shortly after the burglary was committed, the evidence is sufficient to take the case to the jury as to both the burglary and larceny.
3. **———: Instruction: Not Preserved in Bill.** The action of the court in refusing instructions on the subject of alibi, set

out in the record proper but not made a part of the bill of exceptions, is not for review on appeal.

4. ———: **Cross-Examination of Witness: Former Penitentiary Record of Defendant: Collateral Matter: Alibi.** The defendant was charged with burglary and larceny of money and a watch, and interposed an alibi as a defense. The State had shown that a short time after the burglary defendant had gone to a saloon and exchanged ten dollars in silver for a ten-dollar bill. For the purpose of accounting for the fact that he had ten dollars in his possession, defendant called a witness who testified that defendant was usually employed and that he had been employed in another city for three or four years preceding the date of the offense. The prosecuting attorney, on cross-examination, asked the witness if he did not know that defendant was in the penitentiary during the time he had testified he was in said city. The defendant had not testified and had not introduced evidence of good character. *Held*, that it was error to permit the prosecuting attorney to cross-examine the witness as to defendant's former imprisonment.
5. ———: ———: ———: ———: ———: **Cured by Direction to Disregard.** On cross-examination the witness testified that he had heard persons say that defendant was in the penitentiary during the time witness had on direct examination testified he was in another city, and after defendant's motion to strike out this answer was overruled the court, of its own motion, said: "That part which he heard will be stricken out and will not be considered by the jury." *Held*, that the error in permitting the prosecuting attorney, on cross-examination, to ask the witness if defendant was not in the penitentiary during the time he had testified he was in another city, was not cured by the action of the court in striking out what the witness heard and directing the jury to disregard it. The court did not strike out the previous cross-examination relating to defendant's former imprisonment, and that was the prejudicial matter in the cross-examination. Besides even had the court stricken that out, it is doubtful whether thereby the unfavorable impression the jury had received of defendant's character and reputation would have been removed from their minds, so as to cure the error.
6. ———: **Instruction: General Verdict: Separate Offenses.** Burglary and larceny may be joined in the same information, but they are separate and distinct offenses, and upon a trial the jury may acquit of both, or convict of both, or convict of one and acquit of the other; and an instruction that requires them to convict of both or acquit of both, with no instruction or provision for separate verdicts, is error.

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7. ———: ———: **No Exception: No Request.** Although no exception was saved to an erroneous instruction given for the State, or to a failure to instruct on all the law of the case, and no other objection was made except that in the motion for a new trial it was assigned as error that the court "erred in failing to instruct on the whole law governing the case," the defendant is entitled to a reversal of the judgment of conviction of both larceny and burglary on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict," as the statute (Sec. 5231, R. S. 1909) specifically requires. The court should have given instructions providing for a separate verdict as to the distinct offenses, whether requested or not, and whether or not an exception was saved to its failure to do so, a failure to so instruct will work a reversal on appeal.
8. ———: ———: ———: **Non-Direction.** Non-direction, with or without exceptions saved, is error in a felony case. There is an inherent difference in this regard between civil and criminal cases, some of which are enumerated in the opinion. Besides, the statute specifically requires instructions to the jury, "whether requested or not, upon all questions of law arising" in a criminal case "which are necessary for their information in giving their verdict;" and into that statute cannot be read the proviso that non-direction in a felony case is not error which will warrant a new trial unless it affirmatively appear that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to its failure to so instruct.
9. ———: ———: ———: ———: **In Felony Cases: Statute.** The provision in said Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case.
10. ———: ———: ———: ———: **Motion for New Trial: General Assignment: Usually Insufficient: Exception.** The motion for a new trial should call the court's attention to
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the specific point of law on which it is claimed the court failed to instruct; otherwise, it will ordinarily be insufficient; but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of justice, will grant a new trial, though the point be presented in it for the first time.

Appeal from Greene Criminal Court.—*Hon. Alfred Page*, Judge.

REVERSED AND REMANDED.

Talma S. Hefferman for appellant.

Elliott W. Major, Attorney-General, and *John M. Dawson*, Assistant Attorney-General, for the State.

(1) It is not necessary that the information describe any property kept in the house, or allege that the goods, wares, merchandise or other valuable thing kept therein was the subject of larceny. *State v. McGuire*, 193 Mo. 215; *State v. Helms*, 179 Mo. 280. (2) Where the State calls a witness whose name is not endorsed on the information, defendant, when said witness is called, should move for a continuance on the ground of surprise; and if he fails to do that, he waives any right to complain by reason of surprise. *State v. Whitsett*, 232 Mo. 511; *State v. Henderson*, 212 Mo. 213; *State v. Manning*, 168 Mo. 418; *State v. Barrington*, 198 Mo. 23; *State v. Myers*, 198 Mo. 225; 1 Bishop's New Crim. Prac., sec. 869a; *Ballard v. State*, 19 Neb. 609; *State v. O'Day*, 89 Mo. 559. (3) *Duncan* was asked if he knew appellant had been in the penitentiary. He answered he did not know, but he heard that he was, to which appellant objected and the court sustained the objection as to the part the witness heard. The court stated that that part would be stricken out and would not be considered by the jury.

(4) Instruction 1 concisely defines the offense in the language of the statute and the punishment as announced by the statute and properly defines the word "feloniously." R. S. 1909, sec. 4520. (5) Instruction 2 is properly based upon the evidence as to the condition of the door by which the entrance was made into the saloon, and also properly defines "larceny." State v. Henderson, 212 Mo. 208; State v. Howard, 203 Mo. 600. (6) Instruction 3 was a proper instruction upon the recent possession of saloon property. The recent possession of saloon property, taken at the time of the commission of a burglary, is sufficient to justify the jury in finding that the persons in whose possession the same is found was guilty of the burglary as well as the larceny. 1 Greenleaf on Ev., sec. 134; Wigmore on Ev., sec. 153; 4 Elliott on Ev., secs. 2725, 2918; State v. Hammond, 203 Mo. 604; State v. Toohey, 203 Mo. 678; State v. James, 194 Mo. 277; State v. Moore, 117 Mo. 404. (7) In the record proper is incorporated two refused instructions both upon alibi. These instructions are not for review in this court. They are not incorporated in the bill of exceptions. Clerk v. Hughes, 73 Mo. App. 633; Johnson v. Greenleaf, 73 Mo. 671; State v. Johnson, 81 Mo. 60; McLain v. Winchester, 17 Mo. 49; Cline v. Askins, 39 Mo. 39; Montgomery v. Hughes, 81 Mo. 63. (8) The verdict is certain, definite and responsive to the issues joined. It finds appellant guilty of both burglary and larceny and assesses his punishment separately for each offense and no objection can be made as to the form of the verdict.

KENNISH, J.—Appellant, Harry Conway, Bert Drinkwater and Will Kennedy were jointly charged by information in the criminal court of Greene county, at the April term, 1910, with the crimes of burglary and larceny, alleged to have been committed April 13, 1910. Appellant applied for and was granted a sever-

ance. He was tried, convicted of both burglary and larceny, and his punishment assessed at imprisonment in the penitentiary for a term of seven years for the burglary and three years for the larceny. He appealed to this court, but is not represented here by counsel, nor has he filed a brief.

The *corpus delicti* of each of the crimes charged was fully proven by undisputed testimony. The building burglarized and in which the larceny was committed was a saloon in the city of Springfield. It was shown by the testimony that on the night of April 12, 1910, a sum of between two hundred and three hundred dollars and a gold watch were deposited in the safe, and that the saloon was closed and the doors locked at midnight. At five o'clock the next morning it was learned that the saloon had been burglarized, the safe dynamited and the money and watch stolen. A few days after the burglary, Kennedy, coindictée of appellant, pawned a gold watch in said city, which was identified as the watch stolen from the saloon. During appellant's trial the prosecuting attorney nolle prossed the case against Kennedy, and thereupon he testified for the State that appellant gave him the watch and that he pawned it at his request and under his directions. Witness Duke, with whom the watch was pawned, testified that appellant came to him and asked him for more money on a watch, after the watch in question had been pawned, but he further testified that appellant pawned a silver watch with him, on which he then owed appellant a dollar and a half, and that nothing was said by appellant inconsistent with the theory that he had in mind the silver watch and was asking for the balance due on it. There was testimony that appellant, shortly after the burglary, went to a saloon and exchanged ten dollars in silver for a ten-dollar bill, but the witness who testified to that fact said that appellant generally had money and that there was nothing unusual in seeing him with ten or

fifteen dollars in his pocket. That was the only evidence of appellant's possession of the money charged to have been stolen.

Appellant interposed a defense of alibi, and in support thereof it was shown that he was under arrest the night of the burglary, for the violation of a city ordinance, and was not released by the police until about two-thirty or three o'clock in the morning; that the police interviewed appellant's mother, who agreed to pay his fine, and that he was then released. Appellant's mother and sister testified that appellant came home immediately after his release; that after talking awhile he went to bed in a room adjoining theirs, having removed his shoes and hat in their room, as was his habit, and that he did not leave his room the remainder of the night.

The appellant, evidently for the purpose of accounting for the fact that he had ten dollars in his possession a few days after the burglary was committed, called a witness named Duncan, who testified that appellant was usually employed; that he had been employed in Kansas City for three or four years preceding the date of the offense. The prosecuting attorney, on cross-examination, asked the witness if he did not know that appellant was in the penitentiary during the time the witness had stated he was in Kansas City. The question was objected to and the objection was overruled, the court stating, "It is competent for the purpose of determining whether this witness knows he was in Kansas City." The witness answered that he did not know how many times he had been in the penitentiary. When further asked if he knew he was in the penitentiary during the time about which he had testified, the witness said: "I don't know whether he was ever in the penitentiary; I hear them say he was." Appellant moved that the answer be stricken out and the motion was overruled. After the motion was overruled and the ruling excepted to, the

court, of its own motion, said: "That part which he heard will be stricken out and will not be considered by the jury."

I. In the motion for a new trial complaint is made of the action of the court in overruling defendant's motion to quash the information. The motion to quash assailed the information as being vague and indefinite and as failing to charge the defendant with the commission of any offense. We have carefully examined the information, and it is in conformity with approved precedents. [State v. Watson, 141 Mo. 338; State v. Moss, 216 Mo. 436.]

II. Another complaint in the motion for a new trial was that the witness Kennedy should not have been permitted to testify as a witness for the State because his name was not indorsed on the information. It has been repeatedly held by this court that it is not error to permit a witness, whose name is not indorsed on the indictment or information, to testify for the State. [Sec. 5097, R. S. 1909; State v. Steifel, 106 Mo. l. c. 133; State v. Henderson, 186 Mo. l. c. 482; State v. Myers, 198 Mo. l. c. 247.]

III. Objection was also made that Kennedy was not a competent witness against the defendant because he and defendant were jointly charged in the information with the offenses for which defendant was on trial. The defendant was being tried separately. During the trial a *nolle prosequi* was entered as to Kennedy. When the case was nol-prossed as to him he became a competent witness. [Sec. 5241, R. S. 1909; State v. Beauchleigh, 92 Mo. 490; State v. Walker, 98 Mo. 95; State v. Steifel, 106 Mo. 129.]

IV. Defendant's instruction in the nature of a demurrer to the evidence was properly overruled. The evidence clearly showed that both the burglary and

larceny had been committed by some person. There was testimony that defendant was in possession of a part of the stolen property shortly after the burglary was committed. Such evidence was sufficient to take the case to the jury as to both the burglary and the larceny. [State v. Owens, 79 Mo. 619; State v. James, 194 Mo. 268; State v. Toohey, 203 Mo. 674.]

V. The refusal of the court to give two instructions on the subject of alibi, requested by the defendant, is also assigned as error in the motion for a new trial. The two instructions are set out in the record proper, but are not made a part of the bill of exceptions, and therefore the action of the court in refusing them is not before us for review. [State v. Glasscock, 232 Mo. 291; State v. Little, 228 Mo. 273; State v. Earll, 225 Mo. 537; State v. Finley, 193 Mo. 202.]

VI. The objections interposed to the cross-examination of the witness Duncan, concerning appellant's former imprisonment in the penitentiary, should have been sustained. Appellant had not testified as a witness and had not introduced evidence of good character. As he had not injected such an issue into the case, it was not competent for the State to thus assail his character and reputation. When competent evidence is offered tending to show the commission of the offense charged, it is no objection thereto that such evidence also shows the accused to be guilty of another crime. But the question presented here is this: Is it proper to permit the State, on cross-examination of a witness for the defendant, when the character or reputation of the defendant is not in issue, to test the credibility of the witness as to a collateral matter about which he has testified, by asking him whether he does not know that the defendant was in the penitentiary on a given date? The question thus presented, so far as we have been able to find, has not been passed upon

by this court, but authority on the question is not lacking.

In Bishop's New Crim. Proc. vol. 1, sec. 1122, the author says: "Cross-examinations of witnesses, and evidence to discredit them, whereby irrelevant matters is sometimes not improperly brought out, will not be permitted a scope disclosing what tends to prove an irrelevant other crime; for this, under the pretense of justice, would be a wanton prejudice to the defendant."

In the case of State v. Eder, 36 Wash. 482, the court had before it a question similar to the one now under consideration. In that case the wife of a defendant on trial, testifying as a witness in his behalf, stated in her direct examination that she and the defendant were married in the year 1898. On cross-examination, for the purpose of discrediting her testimony, she was asked if the defendant was not in the penitentiary in the year 1898. The court held that such cross-examination was improper and prejudicial to the defendant, and on that ground alone reversed and remanded the cause. In the opinion in that case the court said: "While it is sometimes stated that any circumstance which tends, in the remotest degree, to affect the credibility of a witness can be shown on cross-examination of such witness, yet the rule is not without exception. The fact shown must have a tendency to accomplish the purpose intended, and must not be something which of itself tends directly to prejudice the defendant in the minds of the jury. A defendant can be prejudiced, of course, by showing that his witness is unworthy of belief, but the State cannot, under the guise of impeaching a witness show facts which tend directly to prejudice the defendant, but which only remotely, if at all, discredit the witness."

The same limitation is placed upon the right of the State in the cross-examination of witnesses for the

defendant in the cases of *Hoberg v. State*, 3 Minn. 262, and *Hamilton v. State*, 34 Oh. St. 82.

In our opinion the doctrine announced in the foregoing authorities is sound, and we hold that it was error to permit the prosecuting attorney to cross-examine the witness as to appellant's former imprisonment.

Nor do we think the error was cured by the action of the court in striking out "what the witness heard" and telling the jury to disregard that part of the testimony. The defendant made timely objections to the questions. He also moved that the testimony be stricken out. Had the court sustained the motion and struck out all of the cross-examination relating to the former imprisonment, and told the jury that none of it should be considered in arriving at their verdict, it would still be doubtful whether that would have removed from the minds of the jury the unfavorable impressions they had received of the defendant's character and reputation, so as to cure the error. But when the court permitted the cross-examination over the defendant's objections, and overruled the motion to strike the testimony out, the subsequent ruling by the court that what the witness had heard would be stricken out and should not be considered by the jury, cannot be said to have cured the error. The language of the court necessarily implied, and the jury naturally understood, that a part of the testimony as to the former imprisonment of the defendant in the penitentiary remained in the case for their consideration.

VII. The court, upon the request of the State, gave the following instruction:

"If you find and believe from the evidence in the case that the defendant, either alone or together with another or others, at any time within three years next before the 11th of May, 1910, at the county of Greene and State of Missouri, did feloniously and burglariously break into and enter a building located at num-

ber 238 on West Commercial street in the city of Springfield, Greene county, Missouri, which said building was then occupied as a saloon building by J. P. King, and in which said building there was at the time divers goods, wares, merchandise and valuable things kept and deposited, with intent then and there feloniously and burglariously to steal, take and carry away any of said goods, wares, merchandise and valuable things in said building then and there being, and two hundred and ten dollars, in money, of the value of two hundred and ten dollars, and one gold watch and chain, of the value of thirty-five dollars, or any portion of said money or property of any value whatever, in said building then and there being, and the property of J. P. King, feloniously and burglariously did steal, take and carry away, then you will find the defendant guilty of both burglary and larceny, and for the burglary you will assess his punishment at imprisonment in the State penitentiary for as long a term as you may deem proper, not less than two years; and for the larceny you will assess his punishment, in addition to the punishment fixed for the burglary, at imprisonment in the State penitentiary for a term of not less than two nor more than five years.

“ ‘Feloniously’ means unlawfully, against the solemn admonitions of the law.”

Other instructions were given which correctly instructed the jury as to the presumption of guilt of the burglary and larceny arising from the possession of property recently stolen, in connection with the other facts and circumstances in evidence. No instruction was given directing the jury that they might convict of the burglary and acquit of the larceny, or convict of the larceny and acquit of the burglary, accordingly as they should find and believe from the evidence, and the jury was left with an instruction that authorized only a conviction of both offenses or an acquittal of both. There are blank forms of verdicts found in the

record, without any explanation, from which it would appear that the court had in mind the right of the defendant to have his cause submitted on the theory that the jury might convict of one of the felonies charged and acquit of the other, but these forms were not supported by any instruction, and the question arises, was the failure to give such an instruction prejudicial error?

No exception was saved at the time to the failure of the court to give such an instruction, or to the failure to instruct on all the law of the case, but one ground of the motion for a new trial was "because the court erred in failing to instruct the jury on the whole law governing the case."

The record thus fairly presents the question: Is the appellant entitled to a reversal of the judgment and to a new trial on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict?" It is the settled law of this State that although burglary and larceny may be joined in one indictment, as authorized by statutes, they are nevertheless separate and distinct felonies, and upon a trial the jury may convict or acquit of both or of either. "That the jury could find the defendant guilty of burglary and fail to find him guilty of larceny, there can be no doubt, even though the testimony abundantly established the larceny as well as the burglary." [State v. Howard, 203 Mo. 1. c. 604; State v. Kelsoe, 11 Mo. App. 91; Id., 76 Mo. 505; State v. Nicholas, 222 Mo. 425; State v. Lackey, 230 Mo. 707.] According to the foregoing authorities it was necessary for the information of the jury that they should have been instructed as to their authority under the law to convict of one felony and acquit of the other.

The further question arises as to whether the failure of the court to instruct the jury upon such

question of law has been preserved for review in this court.

It is provided by section 5244, Revised Statutes 1909, that, "the court may instruct the jury in writing on any point of law arising in the cause," and by the next succeeding section that, "on the trial of any indictment or prosecution for a criminal offense, exceptions to any decisions of the court may be made in the same cases and manner provided by law in all civil cases. . . ." These sections have long been a part of the criminal procedure of this State, and even before the enactment of the present statute upon the subject of instructing the jury in criminal cases, this court held that it was the duty of the trial court to instruct the jury on the essential elements of the crime charged, and that a failure so to do, whether requested or excepted to or not, was reversible error. [State v. Kilgore, 70 Mo. 546; State v. Branstetter, 65 Mo. 149; State v. Stonum, 62 Mo. 596; State v. Jones, 61 Mo. 232; State v. Matthews, 20 Mo. 55.] In so holding this court necessarily distinguished between civil and criminal cases, for in the former non-direction is not error. We think the distinction thus made is founded on sound reason. There is an inherent difference, so far as the necessity to instruct is concerned, between the two classes of cases. We shall not attempt to enumerate such differences, but we call attention to the following: In a civil case the jury have all the issues and the relief prayed for set forth in the pleadings, and therefore have information to enable them to act intelligently in returning a verdict, without instructions from the court. In a criminal case, although the jury is required by law to fix the punishment, even in capital cases, there is no guide or information available to them for that purpose and in the absence of instructions they would be left to grope in the dark. This fact is referred to in the case of State v. Nicholas, 222 Mo. 425. In civil cases the interests of the oppos-

ing parties are always antagonistic, while in a criminal case the State does not maintain the same relation to the litigation or to the defendant as a plaintiff in a civil case. The State is concerned alone in the enforcement of the law and in inflicting punishment only in case of guilt. There is no such procedure as judgment by default in a criminal case. The accused must appear in person, and as frequently occurs he is without counsel, or his counsel is not of his own choosing and is compelled to serve without remuneration. These and other considerations which might be mentioned doubtless caused the enactment of the law imposing upon a court learned in the law and paid for his services, a duty which in the interest of public justice could not be shifted upon a defendant, ignorant of his rights, or upon inexperienced and unpaid counsel. Therefore in 1879 the Legislature of this State enacted a law making it the mandatory duty of the court to instruct the jury in criminal cases, while no corresponding law has ever been enacted as to civil cases.

By that statute (Sec. 5231, R. S. 1909), it is provided that: "Whether requested or not the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict; which instructions shall include, whenever necessary, the subjects of good character and reasonable doubt; and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial."

Notwithstanding the apparently mandatory character of the language of the statute it is maintained, and in a number of cases it has been held, that non-direction of the jury upon the law in a criminal case is not error which will warrant a new trial unless it affirmatively appears that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to the court's

action. That view of the law means that while the Legislature has expressly said that a failure of the court to do a certain act shall be good cause for setting aside the verdict and granting a new trial, a proviso should be implied to the effect that such failure shall not so entitle the defendant unless he requested an instruction and excepted to the court's action in failing to give it. This contention is made notwithstanding the fact that the law provides that a request shall not be necessary, and notwithstanding the well-recognized principle of law that criminal statutes are uniformly construed strictly in favor of the accused.

The construction of the statute as to the necessity of a request for the instruction desired and an exception at the time to the court's failure to give it, was first announced, and without referring to the statute, in the case of *State v. Bond*, 191 Mo. 555. That case was followed by this court in a number of later cases. But this court has always held, even while following the doctrine of the *Bond* case, that if an erroneous instruction was requested by a defendant, then it became the duty of the court to give a correct instruction upon that question, and no exception for failure to do so was necessary in order to preserve the court's action as a ground for new trial and for review on appeal. [*State v. Matthews*, 20 Mo. 55; *State v. Jones*, 61 Mo. 232; *State v. Stonum*, 62 Mo. 596; *State v. Lowe*, 93 Mo. 547; *State v. Davis*, 141 Mo. 522; *State v. Adler*, 146 Mo. 18; *State v. Brinkley*, 146 Mo. 37; *State v. Clark*, 147 Mo. 20; *State v. Reed*, 154 Mo. 122; *State v. Fannon*, 158 Mo. 149; *State v. Moore*, 160 Mo. 443; *State v. Barton*, 214 Mo. 316.] That rule is clearly a departure from the law of exceptions in civil cases, and to that extent gives effect to the statute making it the duty of the court to instruct in criminal cases.

In the case of *State v. Nicholas*, 222 Mo. 425, the court did not follow the *Bond* case. Answering the

contention of the State that the defendant had not requested an instruction and therefore could not be heard to complain, this court (l. c. 434) said: "But aside from all this it was plainly the duty of the court, by its instructions, to require the jury to find all of the essential elements of an offense embraced within the charge, and designate to them the nature and character of the punishment they were authorized to assess."

The doctrine of the Nicholas case was reaffirmed in the case of *State v. Lackey*, 230 Mo. 707, in an opinion by the writer, concurred in by GANTT and BURGESS, JJ.; also in the cases of *State v. Hoag*, 232 Mo. 308, in an opinion by BROWN, J., and *State v. Harris*, 232 Mo. 317, in an opinion by FERREISS, J., in both of which the full court concurred. The same construction is also supported by the following cases: *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Mo. 568; *State v. Henson*, 106 Mo. 66; *State v. Hutchinson*, 111 Mo. 357; *State v. Maguire*, 113 Mo. 670; *State v. Nelson*, 118 Mo. 124; *State v. Taylor*, 118 Mo. 153; *State v. Rufus*, 149 Mo. 406.

In view of these decisions it would seem that the law, at least as to whether a request and exception are necessary to save the point as ground for a new trial, should be considered as settled, but because of some new points of attack upon these recent decisions, a few additional observations will be added.

No State, except the States of Kansas and Texas, has a statute even substantially similar to that under review, and therefore general law can aid but little in its construction. Our statute was taken almost verbatim from the laws of Kansas. Since its enactment in 1879 it has been made more mandatory in its evident purpose to guard the rights of the accused, by amendment from time to time, while the Kansas law has remained unchanged. When our statute was adopted the Supreme Court of Kansas had construed their law in

the case of *Craft v. State*, 3 Kan. 450, saying (1. c. 470): "No request of the prosecuting attorney that he only wants instruction as to the first degree given to the jury, nor the omission of the defendant to request the court to thus instruct, can change the duty of the court in this particular. It is a duty which the statute makes obligatory, and a right which the defendant has, to have the court instruct the jury upon the statutory law in reference to the various degrees of murder."

It is established law that when a statute of another State is adopted by the Legislature, the construction placed on the statute prior to its adoption governs.

In the recent case of *State v. Winters*, 81 Kan. 414, the same court concluded an extensive review of its former decisions upon the subject as follows:

"These cases are sufficient to illustrate the limitations upon the compulsory aspect of the statute which have been recognized since *Craft's* case was decided, in April, 1866. From all the decisions noted it may be concluded that the statute means what it says and should be followed, but that a duty rests on counsel for the defendant to aid and not to ambush the court, and consequently instructions should be requested covering all lesser degrees or lesser crimes involved in the main charge which the defendant desires to be considered. A request sufficient to direct the mind of the court to the subject is enough. Good instructions need not be offered, or a good theory for them formulated; and the evidence itself may point so plainly to the necessity for such instructions that no request is necessary. Generally, however, a failure to make the request waives error in failing to instruct, and, generally, error in failing to instruct or in giving wrong instructions upon lesser degrees or offenses works no prejudice when the defendant is convicted upon satisfying evidence of a higher charge, under correct instructions relating to it. Should it appear that if omitted instructions duly requested or clearly

required by the evidence had been given the jury might naturally and probably have convicted of a lesser degree or offense, the omission will constitute prejudicial error."

It should be noted that section 5245, Revised Statutes 1909, providing that all exceptions in criminal cases shall be governed by the law applicable in civil cases, is identical with sections 6798 of the General Statutes of Kansas of 1909.

The law of Texas is also in substantial agreement with our law upon the subject of the duty of the court to instruct the jury, except that in a subsequent section (Art. 743, T. 8, Tex. R. C. S. 1911) it is provided that, "whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed; unless the error . . . shall be excepted to at the time of the trial." The article making it the duty of the court to instruct the jury is one of the eight referred to. And article 744, T. 8, provides that exceptions in criminal cases shall be governed by the provisions of the law of exceptions in civil cases.

It is unnecessary to do more than refer to the fact that the Texas law, although containing a provision similar to that found in our law, making the civil code as to exceptions applicable to criminal cases, yet added an express requirement in criminal cases that error must be excepted to at the time to be available on appeal, a requirement not found in our law. But even with that requirement the failure of the court to instruct will in certain cases be considered when raised for the first time in the motion for new trial, or even in the appellate court. [See cases cited, Texas Code of Crim. Proc., 1900, p. 242, note 1.]

One provision of our statute to which attention has not been directed in the many cases involving its con-

struction, should be considered. Prior to 1889 no distinction was made between misdemeanor and felony cases, as to the duty of the court to instruct the jury. That year the following words were added to the statute by amendment, "and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial." The language of this amendment amounts to a legislative declaration as to the purpose and intent of this law. It not only states what shall result from the failure to instruct, but that such result shall follow only in felony cases, thereby taking misdemeanor cases out of the rule by necessary implication. It has always been the law in this State and is now that in misdemeanor cases it is the duty of the court to give instructions to the jury, when necessary instructions are requested, and the failure to do so, excepted to at the time, will warrant a new trial, so that if a request and exception are necessary in a felony case, as in a misdemeanor case, the distinction made by the amendment of 1889 becomes meaningless and of no effect. We have given careful consideration to this amendment, and upon no possible theory can we harmonize it with the view that a request for an instruction necessary for the information of the jury and an exception for failure to give it, are necessary to save the point for review in a felony case.

We are aware that a number of cases can be cited that are in conflict with the views herein expressed, and also others in support of such views. Space forbids that we should attempt a full review of such cases. It is sufficient to say that the language of the statute, the facts in connection with the history of the amendments thereto, the construction placed upon the law by the courts of the State from which it was taken, and the imperative necessity, in the interest of justice, that the jury in a criminal case should be instructed as to the law, fully satisfy us as to the correctness of the

cases holding that the failure of the court to give necessary instructions in felony cases shall be good cause for a new trial, without request or exception by the defendant at the time.

The question remains, was the point properly made a ground of the motion for a new trial? The thirteenth ground of the motion was: "Because the court erred in failing to instruct the jury upon the whole law governing the case." In the consideration of this question we must not overlook the language of the statute which bases the right to a new trial upon a failure to instruct the jury on all questions of law arising in the case "which are necessary for their information in giving their verdict." That language, fairly construed, does not mean that the court shall instruct upon any and every question, but only upon such as are necessary and essential to intelligent action by the jury in the trial of the case before them.

Ordinarily technical detail is not required in stating the grounds of the motion for a new trial. But the purpose of the motion generally, not always, is to bring before the court for review rulings made during the trial and to which specific objections were made at the time. However, in the case of alleged error for failure to give necessary instructions, the complaint is because of the non-action of the court, and when such failure is made a ground of the motion for a new trial, we think it is not an unreasonable construction of the statute to hold that the defendant should call the court's attention to the question of law on which it is claimed the court failed to instruct. The court is then given an opportunity to grant a new trial, if the complaint is well founded, without the delay or expense incident to an appeal. This rule does not work a hardship on the defendant, for it gives him the full time allowed for filing the motion to formulate his complaint. It is not only fair to the trial court, but in case of an adverse ruling on the motion, the record on ap-

peal will show on its face the error complained of, when otherwise it would not.

Notwithstanding the foregoing rule, if satisfied from the record that there has been a failure to instruct the jury upon a question which goes to the fundamental rights of the defendant, and that by such failure injustice may have been done or a verdict returned different than if such failure had not occurred, this court, in the interest of justice, will not hesitate to grant a new trial, though the question should be presented here for the first time.

This case is one which we think falls under the exception to the rule. Although the statute authorized the joining of both felonies in one count of the information and the trial of the defendant for both at the same time, he still had the right to have the jury pass separately upon his guilt or innocence of each offense. This right, of vital importance under the law, was denied to him by the instructions, and for that reason, as well as for the error discussed under point 6, we hold that the judgment should be reversed and the cause remanded. It is so ordered. *Ferriss, P. J.*, and *Brown, J.*, concur.

Ex parte LUCY SEE, Petitioner.

Division Two, March 21, 1912.

1. **INFORMATION: Incurrible Girl: Individuating Offense.** The statute (Sec. 1546, R. S. 1909) designating the character of girls that may be committed to the State Industrial Home does not individuate the offense, and it is therefore necessary that the information set out the facts which constitute the alleged offense. An information charging that the sixteen-year-old girl "was then and there unlawfully incurrible to such an extent that she could not be controlled by her parents and guardians, and that her associations were immoral and criminal and bad and vicious" is not sufficient to support a judgment.

Ex parte See.

2. **JUDGMENT: Incurrigible Girl: No Finding of Facts.** A judgment that fails to show that any trial was had or that defendant was found guilty of any offense covered by the statute is insufficient. A judgment which does not find that the girl was incurrigible, or that her associations were immoral or criminal, or bad or vicious, but simply finds that "she is a fit subject to be committed to the State Industrial Home for Girls," will not authorize the sheriff to deprive her of her liberty.

Habeas Corpus.

WRIT ALLOWED.

Thos. F. Gatts for relator.

FERRISS, P. J.—The petitioner, a girl of sixteen years of age, complains that she is unlawfully and wrongfully deprived of her liberty by T. C. Lasley, sheriff of Marion county, Missouri.

It appears from the information and return that on the 2d day of March, 1912, the assistant prosecuting attorney of Marion county filed before one Thomas L. Anderson, justice of the peace, the following information:

"Lewis O'Conner, prosecuting attorney within and for the county of Marion, in the State of Missouri, upon the actual knowledge of F. L. Kelly, as is set forth in the affidavit of said F. L. Kelly, heretofore in and with this court filed, upon his knowledge, information and belief, informs the court that Lucy See, on the . . . day of March, A. D. 1912, at the township of . . . said county of Marion, State of Missouri, being then and there a female child, under the age of eighteen years and over the age of seven years, to-wit: the age of sixteen years, was then and there unlawfully incurrigible to such an extent that she could not be controlled by her parents and guardians, and that the associations of her, the said Lucy See, were then and there immoral and criminal and

bad and vicious, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Missouri.”

The petitioner was arrested upon this information and taken before the said justice of the peace. The transcript of the proceedings before the justice shows as follows:

“Now on this day (March 5, 1912), this cause coming on to be heard, comes the assistant prosecuting attorney, Lewis O’Conner, who prosecutes, on behalf of the State, and the defendant, Lucy See, in her own proper person, and the said defendant, having seen and heard read the information filed in this cause, for plea says she is not guilty in manner and form as charged, and this cause is submitted to the justice for trial. And it appearing to the court that the defendant, Lucy See, is a girl over the age of seven years and under the age of eighteen years, to-wit, of the age of sixteen years, and that she is a fit subject to be committed to the State Industrial Home for Girls, I therefore, the undersigned justice of the peace, do for said offense assess her punishment at confinement in said State Industrial Home for Girls until she reach the age of twenty-one years.

“It is therefore adjudged by the court that the said defendant, Lucy See, be confined in the State Industrial Home for Girls, located at Chillicothe, Livingston county, Missouri, until she is twenty-one years of age, or she be discharged according to law.”

The judge of the Hannibal Court of Common Pleas indorsed his approval upon the sentence of the justice, whereupon the petitioner was committed to Sheriff Lasley, to be taken to the State Industrial Home for Girls, in accordance with the sentence.

This proceeding is attacked on various grounds by the petitioner; among others, that the law under which the proceeding was had is unconstitutional. The

Ex parte See.

proceeding before Justice Anderson was under section 1546, Revised Statutes 1909, which reads as follows:

“Every girl over the age of seven years and under the age of eighteen years, who shall be convicted of being a vagrant, or of any offense not punishable with death or imprisonment for life, or whose associations are immoral or criminal, or bad and vicious, or who is incorrigible to such extent that she cannot be controlled by her parents or guardians in whose custody she may be, may be sentenced to said industrial home until she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had deem the girl so convicted a fit subject to be committed to said home, such sentence to be approved by the circuit or probate judge before being committed, and the age of the girl so committed to be indorsed on the commitment.”

We deem it necessary to consider only the question of the sufficiency of the information and judgment. The statute does not individuate the offense. It is therefore necessary that the information set out the facts which constitute the alleged offense, which is not done. [State v. Hayward, 83 Mo. 299.] We therefore think the information is insufficient to support the judgment. We furthermore think the judgment is insufficient in that it fails to show that any trial was had, and fails to show that the petitioner was found guilty of any offense covered by section 1546. It does not find that she was incorrigible, or that her associations were immoral or criminal, bad or vicious. The justice finds simply that “she is a fit subject to be committed to the State Industrial Home for Girls,” and therefore the justice proceeded to sentence her to the State Industrial Home for Girls “for said offense.” We apprehend that the law does not contemplate that a justice of the peace may sentence a girl to the industrial home simply because he reaches the conclusion that she is a fit subject for that institution.

There is nothing in the judgment of the justice that sustains any allegation of the information. The proceeding, therefore, was without warrant of law, and the petitioner should be discharged. It is so ordered. *Kennish and Brown, JJ.*, concur.

MYRON E. ROSS v. GRAND PANTS COMPANY,
Appellant.

Division Two, March 21, 1912.

1. **PRACTICE: Exceptions: Jury: Omission to Swear a Member: Appeal.** The omission to swear a member of the jury in a civil case is but matter of exception.
2. ———: ———: ———: ———: ———: **Constitutional Question.** There is a conflict in testimony as to whether a member of the jury in a civil case was sworn. Counsel for appellant was present during all the time in point, and yet saved no exception. He now attempts to raise a constitutional question under the provision regarding trial by jury. *Held*, that even if a constitutional question is involved (a matter not discussed), yet, since timely exception was not saved, the Supreme Court cannot decide the point. A constitutional question in order to confer jurisdiction in a given case must not only be raised below, but must be raised at the proper time and kept alive.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

TRANSFERRED TO THE KANSAS CITY COURT OF APPEALS.

Gerson B. Silverman for appellant.

Joseph P. Fontron for respondent.

BLAIR, C.—This court is without jurisdiction of this case unless the construction of the

Constitution of the State is involved. On the part of appellant it is asserted the provision of our Constitution relating to trial by jury was drawn in question in the trial court in this wise: At the close of the evidence in the case the court adjourned until the following morning, and upon its reconvening appellant's counsel stated that after adjournment on the previous day he had learned one of the twelve jurors had not been sworn to try the case, wherefore counsel moved the court "to discharge the entire jury and impanel a new jury." Evidence, pro and con, was heard upon the question of fact thus raised.

Appellant's counsel was at the counsel table when the jury was impaneled, and testified he was cognizant of the fact the juror in question was at first excused and then recalled but had no recollection whether he was sworn. It appeared that the official calling the twelve selected to try the case inadvertently omitted the juror Lockwood and then "in the fraction of a minute" discovered the error and recalled him to the jury box. A young attorney—associated in the trial with appellant's present counsel, engaged in looking after the witnesses and offering occasional suggestions, though not employed by appellant—and one of appellant's employees testified they observed the omission to swear Lockwood at the time it occurred but did not mention it, not knowing it was of importance.

The juror and the deputy who called the jury list preparatory to swearing the twelve gave testimony tending to show all twelve were duly sworn. The court and respondent's counsel had no distinct recollection on the subject.

The court made no definite finding whether the juror was or was not sworn, but stated it was under "the impression from the testimony that the weight of it tends to show the juror was not sworn," and then said counsel had waived the point by not raising it

earlier, the whole transaction having occurred in counsel's presence. The court then heard the testimony of appellant's counsel and thereupon overruled the motion, giving, at that time, no reason for its ruling.

We think this cause must be transferred. An absolute denial of a jury trial in a case in which it is demandable will not be reviewed unless exception is taken and saved (*Ward v. Quinlvin*, 65 Mo. 453; *Klotz v. Perteet*, 101 Mo. 213; *Estes v. Fry*, 94 Mo. l. c. 271; *Smith v. Baer*, 166 Mo. l. c. 401; *Callahan v. Shotwell, Admr.*, 60 Mo. l. c. 401; *Vining v. Insurance Co.*, 89 Mo. App. 319), and for a stronger reason an inadvertent omission to comply with some formality in impaneling one or all of the jurymen must be held unreviewable unless excepted to at the proper time.

Specifically, that the omission to swear any one or all of the jury is but a matter of exception is, in our opinion, well established.

The Supreme Court of Vermont (*Scott v. Moore*, 41 Vt. l. c. 210), considering the identical question presented here, under a constitutional provision similar to ours, held: "The fact that the juror was not sworn, was an irregularity the party might waive, as necessarily it could not affect the fairness of the trial. The juror may have acted as conscientiously and as impartially in the discharge of his duty as a juror as he would have done under oath. It is not shown that he did not."

In the case of *Hardenburgh v. Crary*, 15 How. Pr. 307, it appeared that one of the jury had not been sworn in some five cases in which he sat. The parties were ignorant of the failure to swear him. It was held the objection was but technical and "might have been obviated upon mere mention at the time the irregularity occurred."

In view of the settled rule in this State above restated, the decisions from other states from which we

have quoted and many others of like import (Arnold v. Arnold, 20 Iowa l. c. 275; Jenkins v. City of Hudson, 16 Abb. [N. C.] l. c. 141; Wells v. Smith, 49 W. Va. l. c. 84; State v. Council, 129 N. C. l. c. 516, 517; Railway v. Butler, 52 Tex. Civ. l. c. 325; Burns v. Matthews, 46 S. W. 79; Clements v. Crawford, 42 Tex. l. c. 604; 1 Thompson on Trials, sec. 113 and note), we conclude that any irregularity in administering the oath to the jury or a total or partial failure to administer the oath at all, in a *civil* case, is purely a matter of exception. Being such, an exception should have been saved at the time the omission occurred. Counsel cannot be heard to say he did not know of the omission. His business in court was to see that the trial proceeded in an orderly manner and that every right of his client was preserved and make the record show his exceptions in case he felt his client aggrieved by an adverse ruling.

The point was made too late and was waived by the delay in making it. The question is consequently not in the case at all, and can furnish no basis for the retention by this court of jurisdiction. Timely exception not having been saved, this court could not decide the question if jurisdiction were retained. It would be singular if a question which, on the record here, is clearly not presented for decision on appeal, could yet confer jurisdiction.

A constitutional question in order to confer jurisdiction in a given case must not only be raised below, but must be raised at the proper time and kept alive for decision by this court. [Lohmeyer v. Cordage Co., 214 Mo. l. c. 690; Hartzler v. Railroad, 218 Mo. l. c. 564, 565; Brown v. Railroad, 175 Mo. l. c. 188; St. Joseph v. Life Ins. Co., 183 Mo. l. c. 7; State v. Earll, 225 Mo. 537.]

What has been said is not to be construed to mean that any constitutional question would have been presented even if objection had been properly made and

exception had been taken seasonably to the failure to swear the juror. That question is left for determination until presented for decision. Since the failure to swear the juror is not before us at all, we refrain from discussing whether such failure could in any event be made the basis of a constitutional question. It may be added that decisions in criminal cases are not applicable in this case.

Another thing may be mentioned which fully exculpates counsel from the implication that he was not sufficiently observant. On the record we think the trial court might well have put his ruling on the ground that as a matter of fact the juror was sworn. The juror and the deputy who called the list thought so, and the very fact that counsel, whom the record shows to have been constantly and keenly alive to his client's interest throughout the whole proceedings, failed to observe any thing out of the ordinary in the swearing of the jury, militates strongly against the possibility of such a noticeable omission as failure to swear one of its members. Those who testified directly that such omission occurred disclosed they were not very familiar with court and trial procedure and might easily have been mistaken. In that event, of course, no constitutional question could by any possibility have been presented.

The cause is ordered transferred to the Kansas City Court of Appeals. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. LOUIS KOZLICKIE, Appellant.

Division Two, March 21, 1912.

1. **EVIDENCE: Carnal Knowledge: Offer of Proof.** In this prosecution for carnal knowledge the accused complains upon appeal that the trial court erred in refusing to permit him to prove acts of unchastity of the prosecutrix prior to the commission of the alleged offense, and in confining him to proof of the prosecutrix's general reputation. *Held*, that the colloquy between court, counsel and witness, as set out in the opinion, does not show such error by the court, and besides, even if the court had ruled as complained of, the Supreme Court could not reverse the case, for the accused did not state what facts he wished to show by his witnesses. The mere statement that he proposed "to prove her unchastity by circumstantial evidence" was no such statement of facts.
2. **INSTRUCTIONS: Carnal Knowledge: Facts in Issue.** Where, in a prosecution for carnal knowledge, there was no evidence from which the jury had any right to draw the inference that the prosecutrix had been guilty of acts of lewdness or unchastity, what evidence there was tending to show only that she was sometimes out till midnight with young men at picture shows, and that she talked with men in the bakery, where she worked, an instruction was properly refused which stated that "to establish the unchastity of the prosecuting witness . . . it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by her from which a reasonable inference of her unchastity can be drawn." This instruction would have authorized the jury to find unchastity from evidence which did not show either bad reputation or acts of lewdness or unchastity.

Appeal from St. Louis City Circuit Court.—*Hon. G. C. Hitchcock*, Judge.

AFFIRMED.

Chas. P. Johnson and *Silver & Dumm* for appellant.

(1) The court erred in refusing to permit defendant to prove acts of unchastity of the prosecutrix prior

to the commission of the alleged offense; and erred in confining defendant to proof of her general reputation. *State v. Patterson*, 88 Mo. 88; *State v. Wheeler*, 94 Mo. 252; *State v. Blize*, 111 Mo. 471; *State v. Sharp*, 132 Mo. 172. Defendant was not confined to the general reputation of the prosecutrix for unchastity. Whether she was of previous chaste character was a vital question in the case. It was necessary for the State to allege it and prove it, and for the jury to find it. Any evidence, therefore, which tended to show that she was unchaste was admissible. Nor, under the general rule and the authorities above cited, was defendant limited to direct proof of unchastity. He could show it by circumstances and by specific acts of lewdness and misconduct. He offered to show it by proving by the witness Burkhart, that she associated with men late at night, and in a manner foreign to a chaste and innocent girl. He was denied the privilege of making this proof, and thereby the court committed error. (2) The instruction requested by defendant should have been given. The court refused to give it on the ground that it was not warranted by the evidence. If the court erred, as it is insisted it did, in refusing to permit defendant to prove prosecutrix's bad reputation circumstantially and by proof of acts of lewdness and misconduct, then assuredly it erred in refusing to give this instruction. The court could not reject an offer of competent evidence and then refuse an instruction based on such evidence, on the ground that there was no evidence to warrant it. But outside of the testimony offered and rejected, there was evidence to warrant the giving of the instruction requested by defendant. The father of defendant had testified that the girl went out with young men and stayed out as late as one o'clock in the morning; that she associated with men and boys around the bakery. And Mrs. Belgard testified that she had seen the girl out as late as a quarter to twelve, and when questioned about being

out at that late hour, the prosecutrix said: "I don't want my mother to know it, and I don't want the boss to know it either." The jury were not told, in the instructions given by the court, what constituted previous chaste character, and how it might be proved or disproved. The instruction requested by defendant submitted this issue to the jury, and it should have been given.

Elliott W. Major, Attorney-General and *John M. Dawson*, Assistant Attorney-General, for the State.

Appellant requested instruction 4 in which he sought to have the court declare that to establish the unchastity of the prosecuting witness it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by the prosecuting witness from which a reasonable inference of her chastity may be drawn. This instruction was covered under the reasonable doubt instruction, and we think was properly refused.

ROY, C.—The defendant was charged with having carnal knowledge of Mamie Wesolowski, an unmarried female over fourteen and under eighteen years of age, on April 19, 1910. He was convicted and sentenced to three months in jail and a fine of \$300, and has appealed.

The evidence showed that defendant was twenty-four years old and single, also very deaf. He was employed by his father in a bakery in St. Louis. The Kozlickie family lived upstairs over the bakery. Prosecutrix was employed in the bakery from the latter part of December, 1909, until July 3, 1910. She arose about five o'clock every morning so as to be ready for her work as saleslady in the bakery, and lived with the Kozlickies, sleeping in the dining room. The defendant occupied the front room upstairs.

The prosecutrix testified to the commission of the offense about the first of April, 1910, the act being repeated at various times until July 3, when she left. She testified that she was fourteen in February, 1910, and that she had been pregnant for seven months at the date of the trial, which was December 16, 1910.

There was testimony by a married sister of defendant that prosecutrix would sometimes be out as late as midnight with men at shows, and when spoken to about it by witness, said "I would not want my mother to know it, and I don't want the boss to know it either."

The sister of defendant also testified that she had seen her at other times with boys standing in front of the bakery as late as ten and half past in the evening; and that most every evening prosecutrix and other little girls would stand around the bakery "making noises and carrying on like children of her age would." That was in pleasant weather.

Defendant's father testified that the prosecutrix went out every other night with John Mitulski, coming back at almost twelve o'clock. It continued from April 15 to May 17.

John Mitulski testified that he first met prosecutrix in May and did not go to the bakery often; that he went with her once to a nickelodeon, and went home with her once from a dance.

During the examination of Louis Burkhart, a witness for defendant, the following occurred:

"Now, do you know about the habits of this girl, in going with men, around there?

"Mr. Farrar. I object to him leading the witness. Let the witness state, himself, what he knows about her habits.

"The Court. Objection sustained.

"Q. By Governor Johnson. Do you know of anything—. A. I seen the girl was awful careless with her habits.

"Mr. Farrar. I ask that be stricken out.

"The Court. That will be stricken out. The question is the general reputation of the prosecuting witness for unchastity, and the question ought to be along those lines, Governor Johnson.

"Governor Johnson. I want to get that into the record. I propose to show by this witness and others that this girl was in the habit of going with men late at night, as she has denied; that she associated with men in there; that she associated in a manner which no chaste and innocent girl would do. Now, I propose to show that, not by her general reputation, but by specific testimony of witnesses whom I have here.

"The Court. Well, if you will bring your questions in so that that will be indicated.

"Governor Johnson. If I ask the direct question the objection is that it is a direct question.

"The Court. Go ahead and ask the question.

"Governor Johnson. I have no way excepting by general reputation; and we cannot prove those things by general reputation. We can only prove them by circumstantial evidence.

"Mr. Griffin. Just a minute; Governor Johnson objected to our witnesses testifying to specific acts, my recollection is, when they got on to testify to general reputation; and it seems to me that he is limited to the same rule; and he cannot prove the character of the prosecuting witness by any other facts than by general reputation unless he can show a specific act of intercourse prior to this time with somebody else. If he can, I have no objection to him showing it.

"Governor Johnson: If your Honor sustains that objection, I know where I stand.

"The Court. Objection sustained."

"To which ruling of the court, defendant, by counsel, then and there duly excepted, and still continues to except.

"Governor Johnson. I have stated that I wanted to prove her unchastity by circumstantial evidence. That is all."

The defendant did not testify. He is a Pole and does not speak English. Three witnesses testified to the good reputation of prosecutrix for chastity.

There is no complaint of the instructions given by the court. The defendant asked an instruction which was refused as follows:

"The jury are instructed that to establish the unchastity of the prosecuting witness in this case, it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by the prosecuting witness, from which a reasonable inference of her unchastity can be drawn."

To the refusal of the court to give said instruction, the defendant duly objected and excepted at the time.

I. Appellant contends that the trial court erred in refusing to permit defendant to prove acts of unchastity of the prosecutrix prior to the commission of the alleged offense, and in confining defendant to proof of her general reputation.

We do not so construe the record. When the witness testified that prosecutrix "was awful careless with her habits," the court very properly struck it out. The opinion of the witness was worthless as evidence. He could have stated what her habits were, and the jury could have determined whether they were "awful careless." The court did say that the question was her general reputation for unchastity. But when counsel for defendant offered to show her conduct with men and that she associated with men in a manner which no chaste girl would do, the court said, "Well, if you will bring your question in so that that will be indicated." We cannot conclude from what occurred that the court at any time ruled that the defend-

ant could not show previous acts of lewdness or unchastity by the prosecutrix, and did not rule that the defendant could not prove such by circumstantial evidence; and, even if it was so ruled, the defendant has nowhere stated what evidence he had of such acts.

Was the circumstantial evidence that he had in mind simply evidence that she played and made a noise in front of the bakery as children will do; or that she went to shows with young men. The court had previously overruled many objections to such evidence offered on the part of the defendant. We have no reason to believe that the court would have excluded anything which tended to show previous acts of lewdness or unchastity on her part.

We cannot reverse this case without knowing what the evidence was that the defendant desired to introduce. The mere statement that he proposed "to prove her unchastity by circumstantial evidence" was no showing as to what the evidence was which he had in mind. He should have informed the court what facts he proposed to show by the witness. [State v. Arnold, 206 Mo. 597; State v. Shapiro, 216 Mo. 371.]

II. The instruction asked by defendant was properly refused. The evidence tends to show that the prosecutrix was sometimes out as late as twelve o'clock at night with young men at picture shows; and that she talked with men in the bakery. But that is not evidence from which a jury has any right to draw the inference that she had been guilty of acts of lewdness or unchastity.

Had there been evidence, circumstantial or otherwise, of acts of lewdness or unchastity with other men, then the evidence that she was sometimes out late at night with young men, and talked with men in the bakery would have been for consideration by the jury in connection with the evidence as to such acts. But where there was no evidence of such acts, there was

no basis for the instruction. The decisions of this court allow the chastity of the prosecutrix to be attacked in two ways, by evidence as to her reputation for unchastity, and by evidence of acts of lewdness or unchastity. The defendant's refused instruction authorized the jury to find unchastity from evidence which did not show bad reputation or acts of lewdness or unchastity.

The instruction says "it is not necessary to do so by proof of direct acts of unchastity." There is a broad difference between *direct evidence of an act* and a "direct act." In the latter expression the word "direct" has very little if any significance, while in the former it has a well known legal meaning. The word "direct" can be left out of that instruction without changing the sense. It would then read "it is not necessary to do so by proof of acts of unchastity." That is not the law, because where there is no proof of bad reputation in that respect, there must be evidence of an unchaste or lewd act.

It was doubtless the intention that the jury should be told by that instruction that it was not necessary to prove acts of unchastity by *direct evidence*, but that such acts could be shown by circumstantial evidence.

If such was the intention, the wording of the instruction was unfortunate, and had it been properly drawn, it lacked evidence to support it. The judgment is affirmed. *Blair, C.*, concurs in the result.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All the judges concur.

**FANNIE SONNENFELD, Appellant, v. ROSEN-
THAL-SLOAN MILLINERY COMPANY.**

Division Two, March 21, 1912.

1. **PLEADING: Petition: Estoppel.** When a petition states such improper acts upon the part of defendant as will defer the running of the Statute of Limitations in his favor, a further plea that he is estopped to plead the statute is useless.
2. **LIMITATIONS: Deferred: "Improper Act;"** Sec. 1905, R. S. 1909. The plaintiff's petition alleges, that the defendant corporation wrongfully got possession of its note payable to plaintiff and refused to allow plaintiff to see it; that the president of the corporation was plaintiff's brother, who convinced plaintiff that the note was signed by him instead of by his corporation; that plaintiff, thus deluded, sued her brother upon the note in 1902, in good time; and, finally, that while defendant corporation knew of the pendency of plaintiff's suit against her brother as maker of the note, it used all means to prevent her from learning the truth about the note until after the Statute of Limitations had run. *Held*, that the petition stated such improper acts on the part of defendant corporation as would defer the running of the Statute of Limitations in accordance with Sec. 1905, R. S. 1909.

Appeal from St. Louis City Circuit Court.—*Hon. M.
G. Reynolds*, Judge.

REVERSED AND REMANDED.

David Goldsmith for appellant.

(1) The fact alleged in the petition of the plaintiff, that the defendant had orally agreed not to plead the Statute of Limitations, and that plaintiff had relied thereon, is sufficient, as matter of estoppel at common law, to prevent the defendant from invoking that statute. *Bridges v. Stephens*, 132 Mo. 524; *Asphalt Co. v. Transit Co.*, 102 Mo. App. 468; *Monroe v. Herrington*, 110 Mo. App. 515; *Barcroft v. Davis*, 91 N. C. 363; *Joyner v. Massey*, 97 N. C. 148; *Cecil v. Henderson*, 121 N. C. 247; *Holman v. Omaha*, 117 Ia. 268;

Schroeder v. Young, 161 U. S. 334; Davis v. Dyer, 56 N. H. 143; Renackowsky v. Water Commissioners, 122 Mich. 613; Armstrong v. Levan, 109 Pa. St. 177; Dry Goods Co. v. Goss, 65 Mo. App. 63; Railroad v. Com. Co., 71 Mo. App. 303. (2) The facts pleaded in the petition are sufficient to bring the case within the statutory provision of Sec. 4290, R. S. 1899 (Sec. 1905, R. S. 1909), and thus preclude the plaintiff from relying on the Statute of Limitations. Nelson v. Beveridge, 21 Mo. 22; Arnold v. Scott, 2 Mo. 14; Foley v. Jones, 52 Mo. 64; Wells v. Halpin, 59 Mo. 92; Hoffman v. Parry, 22 Mo. App. 20; Hamilton v. Wright, 87 S. W. 1093; Speakman v. Railroad, 114 Ky. 264; Bank v. Distilling Co., 152 Fed. 248; Reynolds' Admsrs. v. Gawthrop's Heirs, 37 W. Va. 7; Vanbibber v. Bierner, 6 W. Va. 179.

Albert Arnstein and Judson & Green for respondent.

(1) An essential element of estoppel is that the party invoking it relied upon the conduct or representations of the other, and had been induced thereby to act or refrain from acting, and that he will be substantially injured if the other party is allowed to repudiate his action. 11 Am. & Eng. Ency. Law, 436, and authorities under note 1; Spurlock v. Sproule, 72 Mo. 573; Monks v. Beldon, 80 Mo. 639; Hequerbourg v. Edwards, 155 Mo. 514. The petition shows that plaintiff did not rely upon the representation set forth therein, that defendant would not plead the Statute of Limitations. (2) The running of the Statute of Limitations is not arrested, where a person is ignorant of his cause of action, but had the means of discovering it. Callan v. Callan, 175 Mo. 346; Reiss v. Clarenbach, 61 Mo. 310; Shelby County v. Bragg, 135 Mo. 291; State ex rel. v. Yates, 231 Mo. 276; Springer v. Hardy, 4 Mo. 573; Clapp v. Leavens, 164 Fed. 318. It follows

that the exceptions in the limitation law were never enacted to relieve a person from its operation, who at one time fully knew his cause of action, but subsequently forgot it. *Ragland v. Owen*, 84 Va. 237; *Battle v. Crawford*, 68 Mo. 280; *Mereness v. Bank*, 83 N. W. (Ia.), 711; *Myers v. Cronk*, 10 N. Y. S. App. 125; *Railroad v. Mayo*, 65 Me. 566; *Piper v. Hoard*, 107 N. Y. 67; *Manly v. Bewicke*, 3 K. & J. 342; *Plank v. Humphries*, 66 S. E. (W. Va.), 94. Plaintiff's petition admits that in July, 1894, when she received the note, she knew that the I. B. Rosenthal Millinery Company was the maker; she knew in November, 1894, that defendant paid her the interest thereon, and admits that she had the note in her possession continuously until 1896, two years thereafter. (3) Section 1905, Revised Statutes 1909, refers only to the "improper acts" of a defendant by which service of process or some other step necessary to the commencement of a suit and obtaining jurisdiction of the person or subject-matter was prevented. *Shelby County v. Bragg*, 136 Mo. 291; *Burrus v. Cook*, 215 Mo. 496; *State ex rel. v. Yates*, 231 Mo. 276; *Chapman v. Hudson*, 46 Ark. 489; *Graham v. Staunton*, 177 Mass. 321; *Arnold v. Scott*, 2 Mo. 14. The possession of the note was not necessary for the "commencement of the action;" it was but the evidence of the contract. (4) Applying the doctrine of *ejusdem generis* in construing Sec. 1905, R. S. 1909, makes clear the meaning of the words "improper act." The improper act which will prevent the commencement of an action must be similar to that of absconding or concealing himself by the debtor, such as concealing the specific property sought to be recovered; this would prevent the commencement of the action. *State ex rel. v. Tennis*, 79 Mo. App. 12; *Shelby County v. Bragg*, 135 Mo. 291. (5) As the cause of action accrued in 1894 at which time the plaintiff's alleged disability to sue did not exist, the running of the statute was not arrested

by any disability subsequently arising. R. S. 1909, sec. 1904; Wood on Limitations (3 Ed.), sec. 6; McDonald v. Hovey, 110 U. S. 619; Burr v. Williams, 20 Ark. 171; Denton v. Brownlee Co., 24 Ark. 557; Richardson v. Cogswell, 47 Ark. 170.

ROY, C.—This suit was instituted July 13, 1905, in the circuit court of the city of St. Louis and comes here on plaintiff's appeal from a judgment sustaining a demurrer to the third amended petition which is as follows:

“Plaintiff by leave of court files this her third amended petition and for cause of action states, that the defendant is a corporation duly organized under and by virtue of the laws of the State of Missouri.

“That on July 10, 1894, I. B. Rosenthal Millinery Company, a corporation duly organized under the laws of the State of Missouri, executed and delivered to plaintiff its negotiable promissory note, whereby said company promised to pay to the order of plaintiff, for value received, on demand, the sum of ten thousand, four hundred and seventy and 40-100 dollars with interest from date at the rate of six (6 per cent) per cent per annum.

“That on November 10, 1894, the said I. B. Rosenthal Millinery Company paid to plaintiff all interest due on said note.

“That on the 1st day of January, 1900, the corporation name of the I. B. Rosenthal Millinery Company was changed and the name the Rosenthal-Sloan Millinery Company was adopted, and that the Rosenthal-Sloan Millinery Company, the defendant herein, is the same corporation which was formerly known as I. B. Rosenthal Millinery Company.

“The plaintiff further states that she is unable to file said note with her petition because of the fact that the defendant, through its officers, agents and servants, in 1896, obtained possession of said note

wrongfully, fraudulently, without paying any consideration therefor, and without the knowledge or consent of plaintiff. That upon direction of defendant, said note was abstracted from a safe-deposit box where it had been placed by plaintiff, by one of the agents of defendant, and by said agent delivered to defendant, and defendant has since said time wrongfully retained possession of said note.

"Plaintiff states that during the years from 1896 to 1901 inclusive, she at various times and occasions discussed with the president of the defendant the payment of said note; that said officer of defendant frequently stated to plaintiff that it was not convenient to pay said note, assured her most earnestly that she was entirely safe and would be paid, and further stated to plaintiff that even if said note was not paid within ten years, that still it would be a good note, because the Statutes of Limitations would never be pleaded against said note as a bar to same, and plaintiff did not sue on said note because of said statements, until as hereinafter stated.

"Plaintiff further states that the president of defendant company, during all of the years above mentioned, was I. B. Rosenthal; that the said I. B. Rosenthal is the brother of plaintiff; that during the conversation as aforesaid which she had with the president of defendant, her brother, I. B. Rosenthal, with reference to said note, the payment thereof and the Statute of Limitations, that the president of defendant, her brother, with the intention of deceiving and defrauding plaintiff, and causing her to lose her legal rights against the defendant with reference to said note, the said president of the defendant always referred to said note as "my note," and the said president was so earnest in his request to plaintiff at the various times that they discussed said note, that the plaintiff, his sister, should not proceed against her brother on "his note," that the president of defendant

finally succeeded in causing plaintiff to believe that it was the note of her brother, I. B. Rosenthal, and not the note of I. B. Rosenthal Millinery Company; this defendant.

“That plaintiff and her brother, I. B. Rosenthal, during the years above mentioned showed all the love and affection due from a brother and sister towards each other, and plaintiff relied implicitly upon the statements made to her by her brother, I. B. Rosenthal, because of her love for him and her confidence in him.

“Plaintiff further states that during the fall of 1901 she went to the establishment of defendant and made a peremptory demand for the payment of said note of her brother, I. B. Rosenthal, being under the impression from the many false statements made by her brother to her, that her brother I. B. Rosenthal was the maker of said note. That the said president of defendant, acting for and on behalf of defendant, had deliberately, intentionally and falsely misstated the fact as to who was the maker of said note in order to defraud his sister, and in order to protect his corporation, this defendant.

“That at the time of said demand the said I. B. Rosenthal, the president of defendant, refused to pay, and the plaintiff, intending to bring suit on said note, went to the safe-deposit box for said note and then discovered that the note was not in said box where it had been placed by her. That plaintiff ascertained at that time that defendant had possession of said note and had been in possession of same for several years, and plaintiff made demand on defendant that the same be delivered to her, which demand was refused by defendant, and then plaintiff asked of defendant that she be allowed to see said note and this request was refused by defendant. The defendant finally stated that it did not have said note, and refused to tell where said note could be found, and plain-

tiff asked all of the agents and business associates of defendant whom she believed had knowledge of the whereabouts of said note, but none of them gave her any information, though all of said parties knew where said note was, and one of the parties, a business associate of defendant, to whom she applied for information, had said note in his possession at this time and was holding same in order to protect defendant from plaintiff.

"That being unable to locate said note and get possession of same or even to see it, the same being in possession of defendant, or its agents, the plaintiff in September, 1902, instituted suit on said note, and that suit was against her brother, I. B. Rosenthal, because her brother had frequently stated it was his individual note, and not the note of defendant, and plaintiff believed that statement of her brother.

"That defendant intended to defraud plaintiff by taking possession of said note and placing it where the plaintiff could not find it or see said note. That after said suit had been instituted by plaintiff on said note of (\$10,470.40) ten thousand four hundred and seventy dollars and forty cents, against I. B. Rosenthal, the defendant fraudulently and intentionally concealed from plaintiff for more than two years the fact as to the maker of said note, while said suit was pending in court against said I. B. Rosenthal, and defendant only permitted plaintiff to know the truth with reference to the maker of said note in March, 1905, after said note, from its face, was barred by the Statute of Limitations.

"The defendant knew that its president had fraudulently deceived plaintiff as to who was the maker of said note, and knew that its president by false statements had caused her to sue the wrong party, and defendant took fraudulent advantage of plaintiff by closely guarding said note from her, and defendant knew that its president was protecting it

from being sued by causing plaintiff to sue him and by defending said suit, and knew that its president was defending in court, in its behalf, the suit which had been instituted on said note against him as an individual.

“That during the time from September, 1902, to March, 1905, while the president of defendant was contesting in the courts with plaintiff the suit which she had brought against him, the defendant, the real maker of said note, had said note in its possession or under its control, and refused to let plaintiff see said note, or to give any information with reference to it, and defendant used all possible means to prevent plaintiff from learning the truth about said note, and by its action the defendant intended to defraud plaintiff of her rights with reference to said note, and encouraged its president to make defense in court against the suit which plaintiff had instituted against him on said note. That the president of defendant, by false statements, created a condition with reference to said note to the great injury of plaintiff, and the defendant knowingly accepted the benefits which accrued to it by reason of said false statements of its president.

“That defendant knew that its president was making false and fraudulent statements with reference to said note; and defendant encouraged him in the making of such false statements, and the defendant received and accepted all of the benefits accruing to it because of such false and fraudulent statements.

“Plaintiff further states that no part of the principal of said note has ever been paid, and interest paid only to November 10, 1894, and that the whole thereof remains due, together with interest thereon from November 10, 1894.

“Therefore plaintiff prays judgment against the defendant for the sum of ten thousand, four hundred and seventy and 40-100 dollars with interest at the

rate of six (6 per cent) per cent per annum from November 10, 1894, and for her costs."

I. We think that so far as the petition pleads an estoppel, it furnishes the answer thereto. It is useless to say that plaintiff was lulled into a sense of security by the promises of defendant not to plead the Statute of Limitations, for the petition states that plaintiff did bring suit within the time allowed for bringing the suit.

II. On the other branch of the case we think the petition states a good reason why the Statute of Limitation is not available to the defendant.

It appears from the petition that defendant wrongfully got possession of the note and withheld it from plaintiff and refused to allow plaintiff to see it. Plaintiff then thought that the maker of the note was I. B. Rosenthal. She brought suit on the note within the statutory period against I. B. Rosenthal, who was the president of the defendant. The petition states that defendant knew of the pendency of that suit from September, 1902, to March, 1905, and during that time refused to let plaintiff see it, and used all possible means to prevent her from learning the truth about it.

Revised Statutes 1909, section 1905, says: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such an action shall have ceased to be so prevented."

When plaintiff instituted her suit against I. B. Rosenthal in September, 1902, she thought he was the maker. It makes no difference that she once knew who the maker was and had forgotten or been misled about it. She had a right to the possession of the

note. The defendant knew the plaintiff was suing the wrong party.

It is true that the defendant was not bound under the law to furnish the plaintiff information, but it was bound to give her up the note which belonged to her, and which had on its face all the information she needed. The questions arising under section 1889 with reference to actions for relief on the ground of fraud should not be confused with the question here under discussion. When defendant knew that plaintiff was laboring under a mistake as to who was the maker of the note, whether that mistake arose from forgetfulness or otherwise, its refusal to surrender the note or to let her see it was *an improper act*, which prevented the bringing of the suit.

In *Battle v. Crawford*, 68 Mo. 280, it was held that the false and fraudulent representation did not prevent the bringing of the suit. But in this case the act of the defendant was improper and it did prevent the bringing of the suit.

The judgment is reversed and the cause remanded. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Rox, C.*, is adopted as the opinion of the court. All the judges concur.

JULIA SLICER et al. v. T. B. OWENS et al.,
Appellants.

Division Two, March 21, 1912.

1. **BURDEN OF PROOF: Limitations.** The burden of proof was upon defendant who pleaded the Statute of Limitations in an action in ejectment and to quiet title.
2. **SUIT TO QUIET TITLE: Defense of Limitations: Action at Law: Appeal: Statement.** An action under Sec. 2535, R. S. 1909, to quiet title, and for ejectment, to which is pleaded the defense of limitations, is an action at law, and the Supreme Court will not usurp the duty of the trial court, sitting as a jury, to weigh the evidence. The appellate court's statement of the case means simply that there was some evidence of the facts stated.
3. ———: **Limitations: Disability.** Possession acquired during the minority of the plaintiffs, who were still minors at the time of action brought, cannot afford defendant a basis for the plea of the Statute of Limitations.
4. ———: ———: **Color of Title: Defective Deed.** A deed which describes none of the land to which defendant seeks to prove title by limitations, can afford no color of title beyond the bounds of defendant's actual possession.
5. ———: ———: ———: **Corrected Deed.** A deed given in correction of one which did not describe any of the land in suit, will not constructively extend the grantee's prior possession to parts of the land over which he exercised no dominion.
6. ———: ———: **Granting New Trial: Appeal.** Where the trial court, after deciding the many things in issue upon evidence which left many of them uncertain, and after giving judgment, sets aside its findings and grants a new trial, the order granting a new trial must be affirmed.
7. **NEW TRIAL: Combined Subject-Matter of Action: Severed by Order.** Two contiguous, separately described tracts of land were included in each count of the petition in this action to quiet title and for ejectment, and combined also in the finding and judgment of the trial court. Upon a general motion for a new trial, the court ordered a new trial as to one tract, but not as to the other. *Held*, that such order must be taken as opening the whole case for retrial as to both tracts.

Appeal from Butler Circuit Court.—*Hon. J. C. Sheppard*, Judge.

AFFIRMED (*as modified*).

Abington & Phillips for appellants.

(1) Harp's entering onto lot five in section five and clearing the land of underbrush and timber, is occupancy of a character to set in operation the Statute of Limitations. *Johns v. McKibben*, 156 Ill. 71; *Smith v. Bryan*, 44 N. C. 180; *Twohig v. Leamer*, 48 Neb. 247; *Lantry v. Parker*, 37 Neb. 353; *Backus v. Burk*, 63 Minn. 272; *Menkins v. Overhouse*, 22 Mo. 70; *Powell v. Davis*, 54 Mo. 315; *Holliday-Klotz v. Markham*, 96 Mo. App. 51. (2) Harp could transfer his right acquired by adverse possession to the defendant so that title by adverse possession could ripen in defendant. *Cooper v. Ord*, 60 Mo. 420; 1 Cyc. 1003.

Orchard & Cunningham for respondents.

(1) To give color of title a deed must designate clearly the land conveyed. *Hamilton v. Boggess*, 63 Mo. 244; *Wilkerson v. Thompson*, 82 Mo. 328; *Allen v. Mansfield*, 108 Mo. 348; *Brewing Co. v. Payne*, 197 Mo. 428. (2) One claiming title by adverse possession without color of title will be restricted in his possession to the part actually occupied or cultivated. *Bradley v. West*, 60 Mo. 40. (3) When the motion for new trial was sustained in part, it should have been sustained in whole. 2 *Black on Judgments*, sec. 30; *Russell v. Railroad*, 154 Mo. 430; *Cramer v. Barman*, 193 Mo. 329.

BLAIR, C.—This is an appeal from an order of the Butler Circuit Court sustaining a motion for new trial.

The petition contains a count in ejectment to recover possession of lot one of the northwest quarter of section eight and lot five of the southwest quarter of section five, all in township twenty-five, range eight east, Butler county, Missouri, and contains a second count under section 2535, Revised Statutes 1909, to quiet plaintiffs' title to the same lands.

The answer admits possession and admits claim of title, denies all other allegations, sets up a plea of the Statute of Limitations to both counts of the petition and contains a count to quiet title under section 2535, Revised Statutes 1909.

T. A. Slicer, who was the record owner of the land in controversy, died March 3, 1895, leaving as his heirs two minor daughters, the plaintiffs in this case.

For defendant there was evidence tending to show that some time in 1893 James L. Green went upon lot one above described, built a small house and barn thereon, and cleared and inclosed an acre and a half or two acres thereof. In the summer or fall of 1894 he cleared a small part of lot five here involved, the area cleared being variously estimated at from four to six acres. The nature, extent, location (with respect to the lot lines) and object of this clearing by Green, as well as the use, if any, to which he put the ground is not clearly indicated. Until about January or February, 1895, Green had no color of title.

Defendant offered and the court admitted in evidence, over plaintiffs' exception, a deed from one Van Ausdale and wife to James L. Green, dated and acknowledged in November, 1892, and filed for record in March, 1893, purporting to convey lot one of the northeast quarter of section eight and lot five of the northwest quarter of section six, township twenty-five, range eight, east, and other lands.

A deed to the land in suit, dated January 23, acknowledged January 24, and filed February 1, 1895,

signed by Van Ausdale and wife, in which James L. Green was grantee, was put in evidence. Green and his wife executed two deeds, both dated January 24 and filed March 25, 1895, one to W. J. Owens, the original defendant, and one to one Harp, for lots one and five respectively. Harp died thereafter, and by deed dated June 26, 1900, and recorded in March, 1906, his widow attempted to convey lot five to W. J. Owens.

The evidence further tended to show that Green occupied the house on lot one until March 12, 1895, when he delivered possession thereof to W. J. Owens, the defendant, who moved in on the same day and had held possession from that time until the trial.

There was no house and no inclosure on lot five. Harp boarded with Owens and went to work on lot five on March 12, 1895, or very soon thereafter, and held possession of this lot until his death, after which his widow and thereafter tenants of Owens were in possession until the trial. Owens paid the taxes regularly on lot one and Harp paid them on lot five until his death, after which the taxes on this lot were paid by Owens. There was no evidence that Green ever paid any taxes on any of the land.

The second deed from Van Ausdale to Green (dated January 23 and filed February 1, 1895) recited that it was made to correct the description in the first deed from Van Ausdale to Green.

For plaintiffs there was some evidence in rebuttal tending to show that Green abandoned the land in the winter of 1894-95 and was not in possession at the time he sold to Owens and Harp.

On this evidence the court found for defendant and rendered a judgment quieting his title to both lots one and five, describing them.

Plaintiffs filed a motion for new trial which the court overruled as to lot one and sustained as to lot five "on the ground that the Statute of Limitations

had not run against plaintiffs, or in favor of defendants as to said land (lot five) at the time of the institution of this suit." Both plaintiffs and defendant appealed. Since the appeal was taken, W. J. Owens, the original defendant, has died, and his heirs have entered their appearance and been made parties to the record in his stead.

I. The burden was upon defendant to make out his defense under the Statute of Limitations and it was the province of the trial court, sitting as a jury (*Minor v. Burton*, 228 Mo. l. c. 563, 564; *Lee v. Conran*, 213 Mo. l. c. 412, *et seq.*; sec. 1968, R. S. 1909), to weigh the evidence and determine the real facts of the matter. This duty this court cannot usurp. What has been said in the statement of the case is to be taken to mean simply that there was some evidence of the facts stated—enough to require the trial court to pass upon the facts—and not that this court intends the statement made as in any sense a finding of facts one way or the other.

Plaintiffs' father, the owner of the record title, died March 3, 1895, and plaintiffs themselves were then, and until this action was begun, remained, minors.

The possession taken by Owens and Harp could not have begun until March 12, 1895, and it alone could not, by reason of plaintiffs' minority, suffice as a basis for the plea of the statute. The deeds from Green to defendant Owens and to Harp, if accepted in good faith, were sufficient to warrant a finding that the latter succeeded respectively to Green's possession and that defendant in this case was entitled to rely upon that possession for whatever it is worth in making out his proof of title by limitations, provided the subsequent possession of Owens and Harp was of the requisite character and duration. The character and

extent of Green's possession is therefore an important question in this case.

The first deed from Van Ausdale to Green did not describe any of the land in suit and consequently Green had no color of title until the delivery of the second Van Ausdale deed. [Angell on Lim., sec. 408.] The fact that the second deed purported to be a deed of correction made no difference. Such correction could not, in the circumstances of this case, reach into the past and of itself constructively extend Green's *prior* possession to parts of the land over which he exercised no dominion or acts of ownership whatever and to which there is little, if any, evidence he so much as made claim.

Until the delivery of the second Van Ausdale deed, therefore, the Statute of Limitations could not possibly have been set in motion except as to the portions of the tracts involved which were in Green's actual possession.

The *bona fides* of the second Van Ausdale deed to Green (Crispen v. Hannavan, 50 Mo. l. c. 548; Bradley v. West, 60 Mo. l. c. 41; Hunter v. Wethington, 205 Mo. l. c. 293; Gaines v. Saunders, 87 Mo. l. c. 562), Green's possession subsequent to the execution and delivery of that deed, the question of his abandonment of the premises, the question whether, though he had possession of a part of the land under color of title, etc., to the whole, he exercised the requisite acts of ownership over those parts not held in actual possession (Sec. 1882, R. S. 1909; Herbst v. Merrifield, 133 Mo. l. c. 272; Hedges v. Pollard, 149 Mo. l. c. 227), the commencement, character, continuity and duration of Harp's and Owens's possession subsequent to March 12, 1895, as well as other matters of fact, were necessarily presented by the record for the determination of the trial court. The record in this court does not even show when this action was instituted, and that is an important element in a case of this kind.

All these things the trial court was called upon to decide upon evidence which left many, if not all, of them uncertain. The trial court having set aside its findings and judgment on the ground that "the statute had not run," etc., we interpret that rather uncertain language in support of the ruling on the motion for a new trial as meaning that on the evidence then before the court it was of the opinion the finding should have been against title by limitation as to lot five, and that the ruling was on the weight of the evidence.

In such a case this court will not reverse an order granting a new trial in circumstances like those now presented. At the least we cannot say that as a matter of law the court should have declared in this case that the finding must be for defendant. Consequently the order granting a new trial must be affirmed. [*Haven v. Railroad*, 155 Mo. l. c. 230, 231; *McCarty v. Transit Co.*, 192 Mo. l. c. 404.]

II. The order went only to one tract, there being two contiguous, separately described tracts involved. Both tracts were included in both counts of petition and of course included in the same finding and judgment. The motion for new trial was general. It is urged that the court had no power to thus bisect the general finding and judgment and put asunder things joined together in each count of the petition, in the taking of evidence and in the general finding made. We do not find it necessary to decide so broad a question. If in any case a trial court has power in its rulings on a general motion for new trial to divide a verdict, finding or judgment which, as to the subject-matter affected, follows a single count (that being the effect of this judgment when viewed in connection with the joining of both tracts in both counts), then that power is one certainly not to be exercised when it is not clear that there is no such interdepen-

dence in the evidence with respect to the severed parts as to leave it doubtful whether such severance unless made before trial (Sec. 1971, R. S. 1909) might not be productive of injustice. The issues as to the two tracts are so blended in the record in this court that we think that though it could be conceded there exists a power to divide a general finding, this is not a proper case for its exercise and the order entered must be taken as opening the whole case for retrial as to both tracts.

With this modification and amendment of the order entered, the judgment of the trial court is affirmed and the cause remanded. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the judges concur.

SAM B. COOK v. PULITZER PUBLISHING COMPANY, Appellant.

Division Two, March 21, 1912.

1. **DEMURRER: Waived by Thereafter Offering Evidence.** Defendant's demurrer asked at the close of plaintiff's evidence is waived by offering evidence in support of its answer at the close of plaintiff's case and after its demurrer has been overruled. If at the close of all the evidence such demurrer is renewed, it will be considered on appeal, but will be viewed in the light of all the evidence in the case.
2. ———: **Libel: Practice Commended.** In libel and slander cases the practice is recognized and commended of challenging the sufficiency of plaintiff's case, as to the law and the evidence, by an instruction in the nature of a demurrer.
3. **LIBEL: Demurrer: No Express Imputation of Crime: Per Se Libelous.** The absence from the publication of an imputation of crime does not necessarily render the publication non-libelous *per se*. If it does impute crime it is libelous *per se*, and an instruction in the nature of a demurrer, so far as it challenges the sufficiency of the petition, is correctly refused.

4. ———: Pleading: Crime: Necessity for Innuendo. If a publication directly imputes crime it is libelous *per se*, and in such case it is not necessary, in the statement of a cause of action, to plead any extrinsic facts as inducement or to add an innuendo as to its defamatory meaning. On the other hand, if the publication is libelous *per se* as imputing crime, but extrinsic facts are necessary to bring out the defamatory meaning, then the law requires the allegation of such facts as inducement, in order that the actionable character of the words may appear.
5. ———: ———: ———: No Imputation of Official Misconduct: Not Alleged to be Wilful or Malicious: Sufficiency of Petition in this Case. The plaintiff was Secretary of State, and as such officer had authority to examine banks and prevent insolvent banks from continuing in business. The Salmon Bank failed on June 20, 1905, after plaintiff had gone out of office in January, 1905, after a term of four years, and the petition charges that: "On June 28, 1905, in the edition of said newspaper bearing said date, in the editorial columns thereof, the defendant corporation (having reference to said Salmon Bank and plaintiff's connection therewith) did wrongfully, wickedly and with malice publish of and concerning plaintiff the following false, libelous and defamatory words and matter, to-wit: 'Is It a Political Junkshop? The special correspondent of the Post-Dispatch states upon authority of those having examined the Salmon Bank, that the bank has been insolvent since November, 1903. Why was not the bank closed at that time? Why was it permitted to keep its doors open and receive the deposits of a confiding public? Major Harvey Salmon [meaning one of the owners and proprietors of said Salmon Bank] was a member of the Democratic Central Committee, and the intimate political friend of the machine leaders of the Democratic party [meaning the political party with which plaintiff was allied and to which he owed his nomination and election to said office of Secretary of State]. The bank's books were examined just before Ex-Secretary of State Cook [meaning plaintiff] went out of office, but no action was taken and the bank was left open to take the money of unsuspecting depositors. Is the damaging derelict a part of the political junk of the old Democratic State Machine [insinuating and meaning thereby that the plaintiff herein while Secretary of State and while administering the duties of said office was guilty of wilful and malicious partiality, neglect and misconduct in his official capacity and of favoritism and violation of official duty, and was actuated by personal, political and other improper motives in the matter of the examination and supervision of said Salmon Bank, whereby said bank was permitted to carry on its busi-

ness after it had become insolvent, and that in consequence thereof its depositors were misled and deceived and suffered financial loss and injury.] That defendant corporation in the manner and by the means aforesaid did falsely, maliciously and wickedly print, publish, circulate and give currency to the charge that plaintiff while administering the office of Secretary of State (said office being one of public trust as hereinbefore stated) was guilty of partiality, favoritism, official misconduct, violation of official duty, and was actuated by improper motives in relation to the examination and supervision of said Salmon Bank, as hereinbefore more fully stated." The statute provides that "every person exercising or holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under cover of his office, shall, on conviction, be deemed guilty of a misdemeanor." *Held*, that the publication did not impute to plaintiff the commission of a crime, and the case should not have been submitted to the jury upon that hypothesis. The closing allegations of the petition, even if regarded as matters of inducement, do not allege generally that crime was imputed, nor that the partiality, favoritism or official conduct, as set forth, was wilful or malicious, and in the absence of such words of intent the misconduct alleged cannot be construed as imputing crime within the meaning of the law.

6. ———: ———: **Sufficient, Nevertheless: Official Misconduct.** But while the said publication does not charge or impute crime to plaintiff, nor that he was actuated by corrupt motives, it does impute such official misconduct to him as brings it within the statutory definition of libel, and if the facts were false a good cause of action is stated in the petition.
7. ———: ———: **Inducement: Place in Petition.** Matter of inducement should precede the libel and innuendo in the petition. The usual order of pleading is to set it out as prefatory allegations.
8. ———: ———: **Innuendo: Stating Defamatory Meaning In: Inducement Necessary.** Where the defamatory meaning does not appear on the face of the article complained of, but depends upon extrinsic facts, it is not sufficient that such defamatory meaning be alleged in the innuendo only. The want of proper inducement cannot be supplied by innuendo. Words not themselves actionable, cannot be rendered so by innuendo, without a prefatory averment of extrinsic facts, which makes them libelous.
9. ———: **Demurrer: Pleading Sufficient: Facts Insufficient:** **Comment: Privilege.** The publication in this case, charges

that plaintiff, as Secretary of State, having in charge the examination and supervision of banks, was neglectful of official duty and protected an insolvent bank out of political and personal friendship for one of its proprietors, and the petition sufficiently states a cause of action for libel as libel is defined in the statute; but the evidence is reviewed, and the facts stated in the publication being admitted to be true, the comment thereon was not libelous, and the demurrer to the evidence offered at the close of the case should have been sustained.

10. ———: **Comment: Political Junk.** The facts stated in the publication being true it was the right of the newspaper, as of all others, to discuss the failure of the bank whose examination and supervision was imposed by law upon plaintiff as Secretary of State, and to discuss plaintiff as Secretary of State, and to discuss plaintiff's connection therewith; and the right of comment implied the right to discuss the facts and to place thereon the writer's own construction and to express his opinion of the motives which actuated plaintiff in his failure to examine and close the bank and protect the public, regardless of whether the opinion was right or wrong, provided it was based upon facts and was not malicious. And the facts stated, that plaintiff did not examine the bank, that it was insolvent and had been for a long time and that one of its proprietors was his political and personal friend, being established, it was not actionable comment to add, "Is the damaging derelict a part of the political junk of the old Democratic State Machine?" for this inquiry amounted only to: Was this insolvent bank allowed to remain open and take the money of the unsuspecting public because of the political friendship of the Secretary of State for its owners? and that natural inquiry or comment was suggested by the facts established.
11. ———: ———: **Privilege: Justification: Question for Court.** On rehearing it is *held* that the contention that if the publication is libelous on its face, the law presumes malice and falsity, and, the publication being admitted, the evidence could at most raise an issue of fact for the jury, and not a question of law for the court, is sound as to the defense of justification, but unsound as to the defense of privilege. Where the defense of privileged comment is interposed, plaintiff cannot rely on the presumption of malice, for the privilege is not removed except by proof that the facts were untrue or by proof of actual malice. Whereas, when justification is the defense, defendant must assume the burden of proving the truth of the facts stated in the publication.
12. ———: **Comment: Privilege: Overcome by Proof of Falsity or Malice.** The burden is not on the plaintiff, in order to

make out a prima facie case of libel, to prove that the facts stated in the publication were false, or that defendant was actuated by express malice in the comments he made thereon. The true rule is that, when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded, either by proof that the publisher was inspired by actual malice, or that the facts published and commented upon were false; if he fail to prove the one or the other, a prima facie case will not be made out, and the court should sustain a demurrer to the evidence.

Appeal from Boone Circuit Court.—*Hon. E. W. Hinton*, Special Judge.

REVERSED.

Judson & Green and *Edward C. Crow* for appellant.

(1) The article complained of does not impute to plaintiff a crime, and, therefore, it is not libelous *per se*; and, as the petition contains no allegation that any special damages were caused thereby, the article is not libelous in any sense. The petition, therefore, states no cause of action and the court should have taken the case from the jury. *Heller v. Pub. Co.*, 153 Mo. 205; *Ukman v. Record*, 189 Mo. 378; *Greenwood v. Colby*, 26 Neb. 449; *Herrington v. Ingberg*, 97 N. W. 460; *O'Neill v. Star Co.*, 106 N. Y. Supp. 973; *Randall v. News Assn.*, 101 Mich. 561. (2) The article complained of contains only ordinary English words of well known and long established meaning, and it is clear that no words or clauses thereof are used in any ambiguous sense. Its meaning, therefore, could not be enlarged or extended by any innuendo. *Salvateri v. Ghio*, 9 Mo. App. 155; *Ukman v. Record*, 189 Mo. 378; *Christal v. Craig*, 80 Mo. 373; *Dyer v. Morris*, 4 Mo. 214; *Callahan v. Ingram*, 122 Mo. 366. (3) The article in question was a fair comment and criticism of the admitted public acts of a public officer, while in the discharge of the duties of his office, and, therefore, it

was not libelous. *Miner v. Post*, 49 Mich. 358; *Gott v. Pulsifer*, 122 Mass. 235; *Jackson v. Times*, 162 Pa. 406; *Townshend on Libel* (4 Ed.), sec. 258; *Newell on Libel*, sec. 5, p. 567; *Odgers on Libel*, 33; *Duffy v. Post*, 96 N. Y. Supp. 629; *Callahan v. Ingram*, 122 Mo. 365. (4) The right of comment and criticism includes the right to draw reasonable and natural inferences and conclusions from admitted facts or acts; and, the facts which were the basis of this article being admitted, and there being no evidence of malice or ill-will towards plaintiff, the court should have instructed the jury to find for the defendant, because any inferences the article contains are clearly natural and reasonable conclusions from the admitted facts. *Townshend on Libel* (4th Ed.), sec. 258; *Newell on Libel* (2nd Ed.), 568; *People v. Post*, 54 Mich. 457; *Jackson v. Times*, 162 Pa. St. 406; *Ingersoll v. Cycle Co.*, 73 L. J. (K. B. 1904) 754; *Callahan v. Ingram*, 122 Mo. 365. (5) The trial court committed reversible error in permitting the jury to determine whether the article charged plaintiff with the crime of wilful and malicious oppression and partiality, or misconduct, in his official capacity, or under color of his office, by plaintiff's instructions, because the article in question contains no such charge and no such meaning can be imputed to its language without doing violence thereto. *State v. Pinger*, 57 Mo. 243; *State v. Grassie*, 74 Mo. App. 313; *Stone v. Graves*, 80 Mo. 148; *State v. Hein*, 50 Mo. 362; *State v. Mixan*, 41 Mo. 210; *United States v. Deaver*, 14 Fed. 595; *O'Neill v. Star*, 106 N. Y. Supp. 973; *Randall v. News Assn.*, 101 Mich. 561; *McManus v. Jackson*, 28 Mo. 56.

W. M. Williams, Silver & Dumm, and W. H. Rothwell for respondent.

(1) It is sufficient to make a written publication libelous and actionable *per se* that it is false and tends

to expose one to public hatred, contempt and ridicule, or to blacken his reputation. *Nelson v. Musgrave*, 10 Mo. 648; *Price v. Whitely*, 50 Mo. 439; *McGinniss v. Knapp*, 107 Mo. 131; *Ukman v. Record*, 189 Mo. 378; *Manget v. O'Neill*, 51 Mo. App. 26. And this is true even though the publication charges the person alleged to be defamed with no offense known to the law. *Prewitt v. Wilson*, 128 Iowa, 202; *Haynes v. Press Co.*, 169 Mass. 512; *White v. Nichols*, 3 How. 266; R. S. 1899, sec. 2259. An article is presumed to be false and published without sufficient excuse until the contrary is shown. *Russell v. Anthony*, 41 Kan. 451; *Holmes v. Clisberg*, 121 Ga. 241; *McIntyre v. Bransford*, 17 S. W. 359. When the publication is libelous *per se* its falsity and defendant's malice are presumed. *Brown v. Knapp*, 213 Mo. 693; *Thomas v. Bowen*, 45 Pac. 768; *Sander v. Jones*, 13 N. D. 527; *Morse v. Pub. Co.*, 124 Iowa, 707. (2) A defendant is liable for what is insinuated as well as for what is stated explicitly. *Merrill v. Pub. Co.*, 197 Mass. 193; *Brennan v. Tracy*, 2 Mo. App. 540; *State v. Norton*, 89 Me. 294; *Sturvelant v. Root*, 27 N. H. 72; *Drummond v. Leslie*, 5 Blackf. (Ind.) 453; *State v. Armstrong*, 106 Mo. 395. (3) "A publication which falsely and maliciously charges a public officer with misconduct in office is a libel. It is libelous to impute to any one holding an office that he has been guilty of improper conduct in that office. 13 Am. & Eng. Ency. Law (1 Ed.), 309; *Martin v. Paine*, 69 Minn. 482. Words which impute a want of integrity to any one holding an office of confidence or trust are *per se* actionable. *Pub. Co. v. Read*, 13 Ky. L. Jour. 323; *Scougale v. Sweet*, 124 Mich. 323; *Hiller v. Duff*, 62 N. J. L. 101; *Collins v. Pub. Co.*, 74 N. Y. Supp. 78; *Tarraber v. Tribune*, 36 Minn. 591; *Wofford v. Meeks*, 129 Ala. 349; *Cramer v. Riggs*, 17 Wend. 209; *Russell v. Anthony*, 21 Kan. 457. (4) The article sued on is not a fair comment and criticism of the public acts of plaintiff as Secretary of State, and is not non-libelous

for that reason. It assails his motives and his personal integrity in that it charges him with neglect of a public duty because of favoritism and partiality, that is, imputes to him flagrant malfeasance in office. 25 Cyc. 402; 24 Cyc. 401; *Bearce v. Bass*, 88 Me. 521; *Negley v. Farrow*, 60 Md. 177; *Curtis v. Mussey*, 6 Gray 273; *Haynes v. Printing Co.*, 169 Mass. 515; *Newell on S. & L.*, 69; *Russell v. Anthony*, 21 Kan. 417; *Shepherd's Case*, 177 Mo. 244. The intentions and motives of a person are questions of fact to be submitted to the jurors. This is true, both in civil and criminal causes. *Vansicle v. Brown*, 68 Mo. 634; *State v. Williams*, 95 Mo. 247. The question of intent may never be ruled as one of law, but should always be submitted to the jury. *People v. Flack*, 125 N. Y. 324. Whether the publication complained of was a fair comment on and criticism of the public acts of plaintiff as a public officer, was, on the most favorable view of the matter, a question for the jury, as the trier of the facts. "A better view therefore, seems to be that it is only when the publisher goes beyond the limits of fair criticism that his language passes into the region of libel, and the question whether those limits have been transcended, is one for the jury." 18 Am. & Eng. Ency. Law (2d Ed.), 1021-2; *Trigg v. Printing Co.*, 179 N. Y. 154; *Fay v. Harrington*, 176 Mass. 270. (5) Defendant's demurrer to the evidence interposed at the close of plaintiff's case in chief, was rightly overruled; besides, the defendant having proceeded with its case, the case now stands for testing its sufficiency on all the evidence in the case. *Klockenbrink v. Railroad*, 172 Mo. 683; *McGinnis v. Knapp*, 109 Mo. 131; 18 Am. & Eng. Ency. Law (2 Ed.), p. 994; *Sanderson v. Caldwell*, 45 N. Y. 401; *Warner v. Southall*, 4 Ex. L. R. 284. (6) "The rule has, however, been for more than a century, that innuendoes and colloquia are sufficient if the inference they seek to raise is at all admissible, and that the question whether the expressions used were designed

by the defendant to apply to the person to whom it is charged they were intended to apply, is a question of fact for the jury." *State v. Powell*, 66 Mo. App. 614; *Scofield v. Press Co.*, 126 Wis. 81; *McGinniss v. Knapp*, 109 Mo. 139; 13 Pl. & Pr. 55; *Gaither v. Adv. Co.*, 102 Ala. 462; *Blagg v. Sturt*, 59 Eng. Com. L. 899; *Peterson v. Sentman*, 37 Md. 140; *Argabright v. James*, 46 W. Va. 144; *Pollard v. Lyon*, 91 U. S. 233; *Ukman v. Record*, 189 Mo. 393. The amended petition in this case sets forth, as was necessary for the pleader to do, the prefatory statements that the plaintiff was Secretary of State, an office of public trust, from the first Monday in January, 1901, to January 9, 1905; that as such officer it was his duty to examine the banking institutions of the State, their financial conditions and methods, and to require them to observe the law relating to and governing said banking institutions; that the Salmon Bank was one of said banking institutions doing business at Clinton in Henry county, Missouri, during plaintiff's term of office; that on June 28, 1905, the defendant, having reference to said Salmon Bank, and plaintiff's connection therewith, published of and concerning plaintiff the article complained of. Without these prefatory statements the article would have been obscure and the references and allusions therein would not have been plain or certain, hence the necessity of the prefatory averments, the inducement in the petition. With these prefatory averments giving application and explanation to the matter of the article complained of, the explanatory meaning given by the innuendo was warranted. *Peterson v. Sentman*, 37 Md. 140; *Argabright v. James*, 46 W. Va. 444; *Pollard v. Lyon*, 91 U. S. 233; *Ukman v. Record*, 189 Mo. 378.

KENNISH, P. J.—This is an appeal from a judgment in an action for libel. The suit was brought in the circuit court of Cole county. On the application of the defendant a change of venue was awarded to

the circuit court of Boone county, where, upon a trial, at the January term, 1906, a verdict was returned in favor of plaintiff for fifty thousand dollars, twenty-five thousand as compensatory damages and a like sum as punitive damages. Judgment was rendered accordingly and defendant appealed to this court.

By way of inducement and colloquium it is alleged in the petition substantially that plaintiff held the office of Secretary of State in this State from the second Monday in January, 1901, until January 9, 1905, and that as such officer it was his duty under the law, either in person or by bank examiners appointed by him, to examine into the financial condition of all State banks of this State and to require the said banks to comply with the laws relating to them. That during plaintiff's term of office Harvey W. Salmon and G. Y. Salmon were the owners of a private bank and were engaged in the banking business at the city of Clinton in this State, under the name of "Salmon Bank." That the said bank continued in business throughout plaintiff's term of office and until about the 20th day of June, 1905, at which time its business as a private bank was discontinued. That the defendant is a domestic corporation with a paid-up capital stock of one million dollars, and is the owner and publisher of a daily newspaper known as the St. Louis Post-Dispatch. That the said newspaper is printed and published in the city of St. Louis where the defendant has its principal office and is sold and circulated, not only in the city of St. Louis, but in the counties of this State, including Cole county, and also in several other States of the Union.

The petition then alleges the publication of the article complained of as follows:

"That on June 28, 1905, in the edition of said newspaper bearing said date, in the editorial columns thereof, the defendant corporation (having reference to said Salmon Bank and plaintiff's official connec-

tion therewith) did wrongfully, wickedly and with malice publish of and concerning plaintiff the following false, libelous and defamatory words and matter, to-wit:

“IS IT A POLITICAL JUNKSHOP?

“The special correspondent of the Post-Dispatch states upon authority of those having examined the Salmon Bank at Clinton, that the bank has been insolvent since November, 1903, when George M. Casey failed. Why was not the bank closed at that time? Why was it permitted to keep its doors open and receive the deposits of a confiding public? Major Harvey Salmon (meaning one of the owners and proprietors of said Salmon bank) was a member of the Democratic State Central Committee, and the intimate, political friend of the machine leaders of the Democratic party (meaning the political party with which plaintiff was allied and to which he owed his nomination for and election to said office of Secretary of State). The bank's books were examined just before Ex-Secretary of State Cook (meaning plaintiff herein) went out of office, but no action was taken and the bank was left open to take the money of unsuspecting depositors. Is the damaging derelict a part of the political junk of the old “Democratic State Machine” (insinuating and meaning thereby that the plaintiff herein while Secretary of State of this State as aforesaid and while administering the duties of said office was guilty of wilful and malicious partiality, neglect and misconduct in his official capacity and of favoritism and violation of official duty, and was actuated by personal, political and other improper motives in the matter of the examination and supervision of the said Salmon Bank at Clinton, Missouri, whereby said bank was permitted to carry on its business after it had become insolvent and that in consequence thereof its depositors were

misled and deceived and suffered financial loss and injury).”

The petition then alleges the number of copies placed in circulation of the edition of the paper containing the publication complained of and that copies thereof were sold and published in said Cole county.

It is thereafter alleged: “That defendant corporation in the manner and by the means aforesaid did falsely, maliciously and wickedly print, publish, circulate and give currency to the charge that plaintiff, while administering the office of Secretary of State of this State (said office being one of public trust as hereinbefore stated), was guilty of partiality, favoritism, official misconduct, violation of official duty and was actuated by improper motives in relation to the examination and supervision of said Salmon Bank, as hereinbefore more fully stated and set out.”

Judgment is prayed for actual damages in the sum of fifty thousand dollars and for the same amount as punitive damages.

A demurrer to the petition was overruled and defendant filed an answer consisting of three separate defenses: First, a plea to the jurisdiction of the court; Second, an admission of the publication of the article set out in the petition, also of the formal allegations of the petition as to matter of inducement, but denies that the alleged cause of action accrued in Cole county, denies the *innuendo* set forth in the petition, denies that the said publication was false, malicious or defamatory and denies generally the other allegations of the petition; Third, a defense setting forth at length facts covering the history of the Salmon Bank, its bad investments and unsafe condition as disclosed by examinations both before and during plaintiff's term of office, and plaintiff's failure to examine the bank as required by law, also the friendly political relations existing between plaintiff and the owners of the bank;

that when the bank was closed defendant sent correspondents to Clinton to investigate the facts and faithfully published such facts in its columns; that the facts stated in the article complained of were true and the comments thereon were lawful, fair and honest.

The reply contained a plea alleging a waiver of jurisdiction and that the alleged want of jurisdiction had been submitted to and decided by the court in Cole county and was therefore adjudicated. Also a denial of the allegations of paragraph three of the answer.

On the trial, after introducing testimony in support of the matters of inducement alleged in the petition, plaintiff read in evidence the article in suit, also an article relating to the same subject which appeared in an issue of the same paper on July 2, 1905, and rested.

A peremptory instruction in the nature of a demurrer to the evidence was asked by defendant and refused.

The defendant then introduced evidence in support of its answer which covers over four hundred pages of the printed record. This testimony was largely as to the history of the Salmon Bank from its establishment in the year 1868, and particularly as to its financial condition and the reports of bank examiners concerning it during the period of about six or seven years before it was closed. The facts thus developed tended to prove that the owners of the bank had invested largely in cattle ranches in Texas and elsewhere and that the capital therefor had been borrowed from this bank. These ventures were unsuccessful and so involved the affairs of the bank that during the administration of plaintiffs' predecessor in the early part of the year 1900, Bank Examiner Oldham, who had recently examined the bank, wrote to plaintiff's predecessor concerning the necessity of keeping a close watch on this bank, concluding his letter with the statement,

"I am thoroughly of the opinion that they cannot hold out much longer and that a collapse is inevitable." In his written report, made in March, 1900, among other statements showing his opinion as to the dangerous condition of the bank, he said: "I regard the condition of this bank as extremely critical—such as to cause the gravest apprehension." Much correspondence as to the unsafe condition of the bank followed its said examination, all of which was indexed and placed on file in the office of the Secretary of State and remained there during plaintiff's entire term of office. The condition of the bank, as disclosed by Examiner Oldham's report in March, 1900, resulted in a conference between the officers of the bank and the Secretary of State and two bank examiners, in June of that year. At this conference promises were made by the officers of the bank that they would correct the irregularities pointed out, and the Secretary of State then required that the bank make monthly reports to him as to its condition and progress. The bank was again examined December 5, 1900, which disclosed that it had not complied with the requirements and that its condition was unsatisfactory to the department. A letter was then written to the bank by plaintiff's predecessor, calling attention to their failure to correct the irregularities as promised.

Under plaintiff's administration of four years this bank was examined but three times, the last being only a few days before the expiration of plaintiff's term of office. For a period of more than two years while plaintiff was in office, including the year of the Casey failure, it had not been examined at all, although every other bank in the district had been examined at least once during that time, many of them twice and some of them three times. The bank was closed June 20, 1905. Its liabilities were about eight hundred thousand dollars and its assets about ninety-five thousand dollars. When the last examination was made

before the failure, being shortly before the expiration of plaintiff's official term, the bank had on hand, as a part of its assets, forged notes amounting to about two hundred thousand dollars, which plaintiff's examination had failed to discover, besides much of the paper which plaintiff's predecessor had objected to more than four years before. These forged notes and worthless paper were still in the bank at the time of its failure. There was money of about fourteen hundred depositors, including sixty-five thousand dollars of county and school money on deposit when the bank was closed. The names of many prominent citizens had been forged to notes found among the bank's assets. There was much excitement in the county and public meetings were called to discuss the failure, which was also widely discussed by the press of the State.

In rebuttal plaintiff testified in his own behalf that when he was elected to the office of Secretary of State he was not an experienced banker and tried to have as competent men under him as he could secure and so retained all of his predecessor's bank examiners, and that they were all competent men. That he knew Major Salmon well and had been associated with him politically and that they were close friends. That he had entire confidence in Major Salmon's integrity and regarded both owners of the bank as being solvent and wealthy men. That he had no reason to believe that they were in an embarrassed financial condition. That he had never received any political favors from Major Salmon and that he had not neglected his official duty nor favored Major Salmon in discharging the duties of his office.

Mr. Bunce and Mr. Carstarphen, bank examiners under plaintiff, testified as to the examination of the bank during plaintiff's administration.

Defendant offered testimony in rebuttal and at the close of all the evidence renewed its instruction in the nature of a demurrer, which was again refused.

I. Appellant first assigns as error the action of the court in overruling defendant's plea to the jurisdiction of the court over the person of the defendant. Respondent answers that the record fails to show an exception to the ruling thus complained of and that therefore that question is not now open to review. In view of the fact that appellant in its printed argument concedes that this court has recently decided against its contention on the merits of its plea to the jurisdiction and further states that the point is saved only for review in the Supreme Court of the United States, we disallow this assignment without further consideration. [Julian v. Kansas City Star, 209 Mo. 35; Cook v. Globe Pub. Co., 227 Mo. 471.]

II. Complaint is made that the court erred in refusing defendant's instruction in the nature of a demurrer, asked at the close of plaintiff's evidence in chief and renewed at the close of all the evidence. The ruling of the court in refusing such instruction when first asked, need not be considered, for, by offering evidence in support of its answer and renewing its demurrer at the close of all the evidence, the defendant waived its rights under the first demurrer, and must now stand upon the action of the court when the instruction was refused a second time and as viewed under all of the evidence in the case. [Weber v. Strobel, 236 Mo. 649; Klockenbrink v. Railroad, 172 Mo. 678; Eswin v. Railroad, 96 Mo. 290.]

In libel and slander cases the practice is recognized and commended of challenging the sufficiency of plaintiff's case, both as to the law and the evidence, by an instruction in the nature of a demurrer, as was done by the defendant in this case. [Diener v. Chronicle Pub. Co., 230 Mo. 613; Ukman v. Daily Record Co., 189 Mo. 378; Heller v. Pulitzer Pub. Co., 153 Mo. 205.]

In support of the assignment of error under review it is contended by appellant that: "The article

complained of does not impute to plaintiff a crime, and, therefore, it is not libelous *per se*; and, as the petition contains no allegation that any special damages were caused thereby, the article is not libelous in any sense. 'The petition, therefore, states no cause of action and the court should have taken the case from the jury.'

While the absence of an imputation of crime does not necessarily render a publication non-libelous *per se*, yet the question whether crime is so imputed by the publication, is properly presented for decision in this case; for, if it does impute crime, the authorities are agreed that it is libelous *per se* and it would follow that the instruction in the nature of a demurrer, so far as it challenged the sufficiency of the petition, was correctly refused. That part of the article, together with the innuendo explanatory thereof, counted upon by the plaintiff in connection with the context, as imputing the commission of a crime, is as follows: "Is the damaging derelict a part of the political junk of the old 'Democratic State Machine' (insinuating and meaning thereby that the plaintiff herein while Secretary of State of this State as aforesaid and while administering the duties of said office was guilty of wilful and malicious partiality, neglect and misconduct in his official capacity and of favoritism and violation of official duty and was actuated by personal, political and other improper motives in the matter of the examination and supervision of said Salmon Bank at Clinton, Missouri, whereby said bank was permitted to carry on its business after it had become insolvent and that in consequence thereof its depositors were misled and deceived and suffered financial loss and injury)." The crime which respondent maintains was thus charged against plaintiff is defined by section 4411, Revised Statutes 1909, as follows: "Every person exercising or holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity

or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Two questions are thus presented: Does the petition state a cause of action against the defendant, upon the ground that the publication complained of imputed to plaintiff the crime denounced by said section 4411, or do the alleged defamatory words, when construed according to their plain and ordinary meaning, impute to plaintiff such crime? If not, then unless the words are libelous *per se* upon another ground to be referred to presently, the court should have given the instruction as requested, for whether the petition was sufficient in law or whether the words were capable of the defamatory meaning ascribed to them, were questions of law for the court. After a consideration of these questions, both from the stand-point of the cause of action pleaded and the meaning of the words complained of, we have concluded that the court should not have submitted the case to the jury on the hypothesis that the publication imputed to plaintiff the commission of a crime.

If a publication directly imputes crime it is libelous *per se* and in such case it is not necessary in the statement of a cause of action thereon to plead any extrinsic facts as inducement or to add an innuendo as to the defamatory meaning. On the other hand, if the publication is libelous *per se* as imputing crime, but extrinsic facts are necessary to bring out the defamatory meaning, then the law requires the allegation of such facts as inducement, in order that the actionable character of the words may appear. The publication complained of in this case belongs to the latter class, because it does not impute crime on its face. It was therefore necessary that the petition should state the facts showing the defamatory meaning and the crime imputed.

The only averment in the petition as to the libelous character of the words, aside from the innuendo, is the

following: "That defendant corporation in the manner and by the means aforesaid did falsely, maliciously and wickedly print, publish, circulate and give currency to the charge that plaintiff while administering the office of Secretary of State of this State (said office being one of public trust as hereinbefore stated) was guilty of partiality, favoritism, official misconduct, violation of official duty and was actuated by improper motives in relation to the examination and supervision of said Salmon Bank, as hereinbefore more fully stated and set out." This averment, which is not set out in the petition with the prefatory allegations of inducement, may be considered as matter of inducement, although out of the usual order of pleading, in following instead of preceding the alleged libel and innuendo. [Townshend on Slander and Libel (4 Ed.), 451; Beswick v. Chappell, 47 Ky. 486.] Regarding the said allegation as inducement, it is clear that it does not allege an imputation of crime to the plaintiff in the publication complained of. It does not allege generally that crime was imputed, nor that the partiality, favoritism, or official misconduct, as set forth, was either wilful or malicious, and in the absence of such words of intent the misconduct alleged cannot be construed as imputing crime within the meaning of the law. [State v. Boyd, 196 Mo. 52; State v. Hein, 59 Mo. 362.] On the other hand, this allegation does charge the imputation of official misconduct in the publication, a material allegation on the subject hereinafter discussed as to whether the petition states a cause of action upon another and different ground.

Where the defamatory meaning does not appear on the face of the article complained of, but depends upon extrinsic facts, it is not sufficient that such defamatory meaning be alleged in the innuendo only. The law upon this subject is stated in Townshend on Slander and Libel (4 Ed.), 566, 567, as follows: "An innuendo can not perform the office of an inducement;

in other words, the want of proper inducement cannot be supplied by an innuendo. The absence of *inducement*, showing by extrinsic matter that the words charged are actionable, is not supplied by an innuendo attributing to those words a meaning which renders them actionable. Words not in themselves actionable, cannot be rendered so by an innuendo, without a prefatory averment of extrinsic facts, which makes them slanderous." In the early case of *Church v. Bridgman*, 6 Mo. 190, plaintiff sued to recover damages for slander. The alleged slanderous words were that Church was in the habit of passing counterfeit money and had passed a ten-dollar counterfeit note on one Simms and had taken counterfeit money back in the county and purchased horses. The petition failed to allege by way of inducement the defamatory meaning of the words complained of, but, as in the case at bar, sought to impute the defamatory meaning of the alleged slander by an innuendo stating, "meaning that he, the said Church, knew the same to be counterfeit." Discussing the question of pleading, as to the sufficiency of the plaintiff's statement of his cause of action, this court, through *NAPRON, J.*, said: "But the declaration in this case is fatally defective. The slander imputed was in relation to passing counterfeit money, which is no offense under our law, unless it is done knowing the same to be counterfeit. There is no colloquium in the declaration averring that the defendant spoke the words of and concerning the plaintiff, and of and concerning his commission of the offense of passing counterfeit money, knowing the same to be counterfeit. The want of this averment in the colloquium is not helped by the innuendo." In the case of *McManus v. Jackson*, 28 Mo. l. c. 58, this court said: "It is well settled that it is not actionable to charge a person with swearing a lie, unless the petition shows that the speaking of the offensive words had reference to a judicial proceeding. [*Harris v. Woody*, 9 Mo.

112.] The reason is that the words standing alone do not impute a crime, for a man may swear falsely without even having taken an oath in any court or before any officer authorized to administer one. Such words, however, may be rendered actionable, if by way of *inducement* it is set out that there had been a trial or other proceeding in which the plaintiff was sworn as a witness, and that the defendant in using the offensive words referred to such matter and intended to charge the plaintiff with the crime of perjury. . . . That section [now sec. 1837, R. S. 1909] has, however, a limited operation, for though it dispenses with the necessity of showing by extrinsic facts the application of the words to the plaintiff, it is still necessary when the words are not actionable to show their meaning by proper averments in the inducement." And in the case of *Powell v. Crawford*, 107 Mo. l. c. 601, this court said: "We think the court committed no error in holding that the petition in this case failed to state a cause of action. The words charged to have been spoken of the plaintiff are not slanderous *per se*, and, to make them actionable, the colloquium must show that they were used in a connection and sense to make them slanderous. Nor can this be shown by the innuendo. It is not the office of the innuendo to make averments. [*Bundy v. Hart*, 46 Mo. 464; *Christal v. Craig*, 80 Mo. 367.] Viewing the *colloquium* alone, therefore, we fail to discover that the plaintiff was charged with a crime or even a fraud." [See also *Boyce v. Aubuchon*, 34 Mo. App. l. c. 323; *Krup v. Corley*, 95 Mo. App. 640.]

For the foregoing reasons we think the petition failed to state a cause of action upon the ground that the alleged libel imputed crime to the plaintiff. We also hold that the words of the publication are not susceptible of the meaning that crime is imputed thereby to the plaintiff, as will appear from a discussion thereof further on in this opinion.

Because of its failure to state a cause of action on the ground that the words complained of imputed crime, it does not follow that the petition was fatally defective.

As defined by statute, a libel is "the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious publication made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." [Sec. 4818, R. S. 1909.]

It is contended by respondent that the publication is libelous *per se* within the meaning of the statute and without the aid of extrinsic facts to show its defamatory meaning. It is stated in the article that plaintiff held the office of Secretary of State and that for more than a year before the expiration of his term of office the Salmon Bank at Clinton was insolvent, and it asks why the bank was permitted to keep its doors open and receive the deposits of a confiding public. It also appears that Major Salmon, one of the owners of the bank, was the political friend of the plaintiff. That the bank's books were examined just before plaintiff went out of office, but that no action was taken, and the bank was left open to take the money of unsuspecting depositors. The article concludes with the question, "Is the damaging derelict a part of the political junk of the old Democratic State Machine?" These words, when considered with their context and given their ordinary and natural meaning and understood as the reader would understand them, do not stop with the imputation of mere official neglect in failing to examine the bank. The statement of the friendly political relationship existing between plaintiff and one of the owners of the bank gives a sting and edge

to the language by leaving the inference that it was because of such relationship the bank was permitted by plaintiff to remain open and the public sustained the loss of the funds deposited in the insolvent bank. While the publication does not charge or impute crime to plaintiff, nor that he was actuated by corrupt motives, it is, in our opinion, open to the construction of imputing such official misconduct as would bring it within the statutory definition of libel, and if the facts stated were false, then, under the allegations of the petition, a good cause of action was stated. "Written words which impute that one who holds an office has been guilty of improper conduct in that office, or has been actuated by wicked, corrupt or selfish motives, or is incompetent for the position, are actionable." [18 Am. & Eng. Ency. Law (2 Ed.), 949; 25 Cyc. 402, and cases cited; Townshend on Slander and Libel (4 Ed.), sec. 196; Odgers on Libel and Slander (4 Ed.), p. 24; *Tawney v. Simonson*, 109 Minn. l. c. 348.]

The petition being sufficient, as we have held, the correctness of the court's action in refusing the defendant's instruction in the nature of a demurrer, depends upon whether, under all the evidence, plaintiff was entitled to have his case submitted to the jury. The substance of the evidence has been given in the statement of facts. Appellant maintains that the truth of every fact stated in the article was not only proved by the evidence, but that there was no evidence to the contrary. And, excepting the headline and concluding sentence, we think the truth of the article was fully established by the proof. It was shown by documentary evidence, on file in the plaintiff's office during his entire term, that the Salmon Bank was in a most unsafe condition for about a year before plaintiff's term of office began. Bank Examiner Oldham, who examined the bank in March of that year, said in his report: "I regard the condition of this bank as extremely critical—such as to cause the gravest appre-

hension." And: "I therefore recommend that a firm stand be taken and energetic measures be employed in order to put the affairs of this institution in a safe condition and to avert a disastrous collapse." This examiner then also wrote to the department, saying: "I examined Salmon & Salmon Friday and Saturday and regard their condition as extremely critical. Unless they can unload something soon and realize cash I don't see how they can pull through." And again: "It will take energetic and heroic measures to keep that bank open. I note the excuse they make for including the State Bank (85,000 or 90,000) in due from banks good on sight draft. It seems to me that it required a great stretch of the conscience to make oath that the amount due from the defunct State Bank was good on sight draft. Neighboring bankers thought it was the best statement S. & S. ever published while really the poorest. It was a fraud on the public and ought not to be tolerated. They will lose 40,000 to 50,000 on that deal anyway. Casey is not cut out for a banker and such management as his will wreck any bank. The d—l will be to pay when they do bust, an event that I regard as inevitable."

After the report of Oldham's examination in March, 1900, the Secretary of State, plaintiff's predecessor, wrote a long letter to the bank, calling attention to the many irregularities disclosed by the examination. This letter sets forth twenty-nine large loans due the bank, of which it is said. "Some of this paper, I am informed, is absolutely worthless, while the balance of it, where secured at all, is backed by securities that are very slow and inactive, and if they can ever be realized on it will require a long time to do it. . . . Some decided action must be taken concerning it, as further delay will eventually result in wrecking this bank."

In June of that year a conference was held in Kansas City between the officers of the bank, the Secretary

of State and two of his examiners. An arrangement was made by which the bank was to report to the department each month, showing progress in correcting the irregularities to which attention had been called by the examiner and the Secretary of State. These reports were made each month until plaintiff's term of office began, after which they were discontinued.

The bank was again examined on December 5th-7th, 1900. In a letter of the Secretary of State to the bank, commenting on its condition, it is said: "I am pleased to say that it shows that you have made some headway in cleaning up the matters complained of at the last examination, but out of the twenty-nine loans that were specially pointed out as needing immediate attention, you still have on hand twenty, and six of the twenty remain unchanged. . . . You publish to the world that you have \$416,517 loans and discounts, undoubtedly good and clear of incumbrances, as one of the guarantees for the safety of the deposits that you are daily receiving. That is not a correct statement, nor is it a fair statement to the public nor the other bankers in your section of the State."

The first examination after plaintiff's term began was in December, 1901, in the report of which it was stated that: "Personal loans aggregate \$492,004.66; \$100,000 of this paper is *not desirable* or bankable paper." And further: "In regard to the loans about which requirements were made, there is very little change."

The next examination was made in December, 1902, and in the report of this examination attention was called, by red pencil marks, to the notes "long past due," and further to the fact that \$79,000 of the bank's reserve consisted of the assets of the defunct State Bank of Clinton, which were considered of little value. A number of other irregularities in this report were also underscored in red pencil. It was shown that these marks were made to indicate to plaintiff that the

items thus designated needed attention. Following this examination, the plaintiff personally wrote a letter to the bank, in which it was said: "The bank is found in its usual solvent condition and doing a large business." The only criticism made in that letter was that the bank had failed to place to the surplus fund an amount equal to ten per cent of the dividends paid. The bank was not examined at all in the year 1903, although the other bank in Clinton was examined in that year. Casey, a heavy borrower of the bank, failed in 1903, and his failure caused a run on the bank. Plaintiff heard of the Casey failure and its effect on the bank, and telephoned concerning it to McDonald, of St. Louis, who had formerly been connected with the Salmon Bank and was supposed to be informed as to its condition. McDonald told plaintiff that the bank was secured on the Casey paper by life insurance policies which made it safe. No examination was made in the year 1904. No other bank in the district had remained unexamined for the years 1903 and 1904. A few days before plaintiff went out of office the bank was examined by one of the plaintiff's examiners and was reported in good condition, although over two hundred thousand dollars of forged notes were then among the assets of the bank and were treated as genuine in the report. The bank examiner who made that examination stated that he made it for his own protection. His explanation of this statement was that he made the examination "to keep down any criticism." When the bank failed it still had among its assets much of the paper which plaintiff's predecessor in 1900 had demanded should be taken up.

The evidence showed that plaintiff and Major Salmon, one of the owners of the bank, were close personal and political friends.

Assuming the truth of the facts stated in the article, it is contended by appellant that the concluding sentence, "Is the damaging derelict a part of the po-

litical junk of the old Democratic State Machine?" is not a statement of fact, but a fair and honest comment upon and inference drawn from the preceding facts of the article, concerning a matter of public interest, the official acts of a public officer, and therefore privileged and non-libelous under the law.

The legal propositions invoked by appellant that a newspaper has the right fairly and honestly to comment upon a matter of public interest, and that the official conduct of a public officer is a matter of public interest, are well settled. [Branch v. Knapp & Co., 222 Mo. 580; 25 Cyc. 402; 18 Am. & Eng. Ency. Law (2 Ed.), 1041; Odgers on Libel and Slander (4 Ed.), 184.]

This brings us to a consideration of the question as to the actionable character of the last sentence of the article, namely: "Is the damaging derelict a part of the political junk of the old Democratic State Machine?" Is this language to be regarded as the statement of a fact and therefore libelous, if false, or as a comment and opinion based upon the facts previously stated and therefore non-libelous, upon the ground of the qualified privilege of all persons to criticize and comment upon matters of public interest? These questions must be considered in the light of the context and the facts and circumstances as disclosed by the evidence. While the language of this interrogatory is unusual, because of the figurative expressions employed, the meaning is neither obscure nor double. We attach little importance to the words "old Democratic State Machine." So far as they lend support to plaintiff's cause of action and have reference to the subject of the article, the failure of the bank, they mean nothing more and serve no other purpose than to give point to the fact of the friendly political relations existing between plaintiff and the owners of the bank, a fact not only proved by the testimony, but admitted by the plaintiff on the witness stand. The words "dam-

aging derelict" contain no hidden meaning and are intended merely as a striking phrase, descriptive of the insolvent defunct bank. The words "political junk," in the connection used, mean the result or effect of politics as influencing the plaintiff's official conduct in dealing with the Salmon Bank. In plain, ordinary words the meaning and import of the full sentence is this: Was this insolvent bank allowed to remain open and take the money of the unsuspecting public because of the political friendship of the Secretary of State for the owners of the bank. Looking at the entire sentence in the light of the context and the evidence, what new or additional facts do we find stated? Clearly none except the suggestion of political friendship for Major Salmon as a motive for plaintiff's official dereliction with reference to the Salmon Bank.

Under the facts in evidence it was the undoubted right of the defendant, and of all others, to discuss the failure of the bank and the official conduct of plaintiff in connection therewith. Was this right of comment restricted to a restatement of the naked facts, without drawing inferences or expressing opinions thereon, or did the right of comment mean the right to discuss the facts and place thereon the writer's own construction, and to express his opinion of the motives which actuated the officer in his failure to examine and close the bank and protect the public, regardless of whether the opinion was right or wrong, provided it was based upon facts and was not malicious? The two facts that plaintiff and one of the owners of the bank were close political friends, and that this insolvent bank had not been examined for two years, during which time no other bank in the district had escaped examination, fully warranted the inference of that relationship as the cause of the plaintiff's omission to examine this bank. Indeed, the comment suggesting the motive follows as the shadow of the imputation already cast by the facts pre-

viously stated. Plaintiff's failure to protect the public by closing the bank may have been due to neglect or inadvertence, or to his lax enforcement of the law as to that bank because of his political friendship for the owners. It will not do to say that the right of comment would permit the defendant to suggest the first and most favorable explanation, but deny to it the right, in good faith, to suggest the second, which was fully warranted under the conceded facts. The right to comment on matters of public interest means the right to express opinions as to the acts of a public officer and to draw inferences as to his motives, whether such opinions or inferences are right or wrong, reasonable or unreasonable, provided they are made in good faith and based upon the truth. [Branch v. Knapp & Co., 222 Mo. 580; United States v. Smith, 173 Fed. 227; Howarth v. Barlow, 113 App. Div. (N. Y.) 510; Townshend on Libel and Slander (4 Ed.), 258.]

Discussing the question of the right to comment upon the official acts of a public officer, this court, in the case of Branch v. Knapp & Co., supra, l. c. 603, said: "The plaintiff was a public officer. The article related to his action as such, to-wit, his vote for United States Senator, and as such was subject to a fair criticism by the newspaper press. It is not libelous merely to point out a seeming inconsistency in a public officer, and while our laws rigidly protect the private character of the citizen, the acts of a public officer are fairly open to criticism and comment."

The subject has been recently considered in the case of Howarth v. Barlow, supra, and because of its applicability, both in law and fact, to the case in hand, we feel justified in quoting therefrom at some length. It appeared that the plaintiff, a clerk of a board of village trustees, presented bills for audit, among which was a bill for material furnished by the claimant to the plaintiff personally. The matter being taken up by

the village taxpayers' association, the defendant, a member of that association, laid the bill before the village president, saying that it had been "held up" by the committee, and "you see what the intent was. . . . You should call for his resignation," etc. The plaintiff sued for slander and testified that his personal bill had been submitted for audit and payment by the city innocently and through mistake. The defendant had expressed the opinion that it was intentionally done to defraud the city, and the question was presented as to the liability of the defendant for imputing a wrong motive to the conduct of the plaintiff. On these facts GAYNOR, J., speaking for the court, said:

"It is enough to say that the plaintiff was in the wrong, either by design or official negligence, in presenting the claim to the trustees, and that it was the right of the defendant to show the matter to the president of the village, or to any citizen, and discuss it fully, and call in question whether the plaintiff had an honest intent in including a false item in the claim. And he was by no means obliged to take the plaintiff's word for it, or that of the claimant.

"The plaintiff's whole official conduct in the matter was open to the fullest criticism, and the defendant and all other persons had the right to draw from it and express any opinions or inferences that could be drawn from it, although contrary, and it may be, more reasonable ones could be drawn from it. That such opinions or inferences are far-fetched, high strung or severely moral, or contrary to other opinions or inferences that seem more reasonable, does not matter so long as there be a basis for them in the acts or words of the person who is the subject of such criticism. The majority or prevailing opinion is not the test of whether such opinion or inference be permissible. The prevailing or majority opinion is often the wrong one, and for that reason the law gives full latitude to the expression of any and all opinions on things of general

concern. It does not matter that the opinions or inferences expressed are not the most charitable or reasonable ones, or that they are the wrong ones, provided they be based on the facts, and the facts are capable of them. This is the rule of latitude of discussion and criticism of the conduct of every one who holds a public office, or writes a book, or does any act by which he invites public attention and criticism. [McDonald v. Sun Printing and Pub. Assn., 45 Misc. Rep. 441.]

“The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement. And this is the great safeguard of free government and of pure government. This is fundamental among us. The defendant made no false statement, and had the right to question the intent of the plaintiff from his concededly unlawful act, and the ease with which it could be made the means of spoliating the public funds. The plaintiff’s act was susceptible of an inference of wrong intent.”

In the case of the *United States v. Smith*, 173 Fed. 240, a case in which the defendants were sued for an alleged libel in charging fraud in the purchase by certain parties representing the United States Government, of the rights of a French company in the Panama Canal property, the court, in the course of the opinion, said: “It is the duty of a public newspaper, such as is owned and conducted by these defendants, to tell the people, its subscribers, its readers, the facts that it may find out about public questions, or matters of public interest and it is its duty and its right to draw inferences from the facts known—draw them for the people.”

In the exercise of the right of criticism in matters of public interest it necessarily results that public officers will not always be placed before the people in

their true character but that their official acts will be misconstrued and wrong motives will be imputed even when they are entirely free from blame and no valid basis for unfavorable comment exists. That is the common experience of all who have held public office. This incident of official position was aptly expressed by the noted English jurist, COCKBURN, C. J., as follows: "Those who fill 'a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties.'" [Newell on Slander and Libel (2 Ed.), p. 577.]

Whether the plaintiff in failing to enforce the law against the Salmon Bank, was or was not actuated by the motives imputed in the article complained of, we are satisfied that such an inference and comment was fully warranted by the facts and circumstances in evidence, and as the facts upon which the comment was made were true, the publication was not defamatory under the law of libel but was privileged as a criticism and comment upon a matter of public interest.

In the conclusion arrived at we have not overlooked the principle of law that comment and criticism, to be privileged, must be fair and honest and not malicious, and that whether it is fair and honest is a question for the jury. While that is the law, the burden is on the plaintiff to prove that a comment is unfair and dishonest, and if there is no evidence on which a rational verdict could be found on the basis that the comment is malicious, as we hold in this case, the case should not be submitted to the jury.

Our conclusion, after a thorough consideration of this case, is that the court erred in failing to give an

instruction in the nature of a demurrer to the evidence. Having taken that view of the case, it is unnecessary to review the many other errors complained of in appellant's brief. For the foregoing reasons the judgment is reversed. *Ferriss, J., and Brown, J., concur.*

ON MOTION FOR REHEARING.

KENNISH, J.—Because of the insistence of distinguished counsel for respondent as to the correctness of their contention, we have deemed it proper to review the more important points urged in support of the motion for a rehearing.

The publication complained of consisted of two parts: alleged facts, and comments thereon. Both the facts and the comment relate to the official acts of a public officer. That fact is disclosed by plaintiff's petition. One of the defenses was that the article, being a fair comment upon a matter of public interest, was protected by a qualified privilege and therefore was not actionable. Another defense was that of justification by alleging the truth of the facts published.

At the close of all the evidence the defendant asked the court to give an instruction directing a verdict for the defendant. The opinion filed herein holds that the plaintiff had not made out a *prima facie* case, and that the court erred in refusing said instruction.

In the motion for a rehearing and brief, respondent complains that the opinion is at variance with the law of libel, for the reason that if the article is libelous on its face, as the opinion holds, then the law presumes malice and falsity and, the publication being admitted, the evidence of the defendant could at most raise but an issue of fact for the jury, and not a question of law for the court. This complaint is sound as to the defense of justification, but it is unsound as to the defense of privilege.

The truth is always a defense to libel and available to all persons under the guaranty of the Constitution. In establishing that defense it is not essential that the defendant also rebut malice. Indeed that defense may be complete, though it be shown that the defendant was actuated by express malice. It follows that if in invoking the defense of qualified privilege, the defendant must prove the truth of the facts on which the comment is based, while the presumption of malice remains against him, he has gained nothing by the defense of privilege, for his burden is no less than under the defense of justification.

There is much contrariety of opinion in the decisions as to whether the plaintiff or defendant must bear the burden of proof upon the issue of the truth or falsity of the facts commented upon and upon the issue of malice, where the defense of qualified privilege of comment upon a matter of public interest is made, as in the case in hand. To attempt to reconcile the decisions would be an impossible task. The law applicable in case of the defense of privileged communication, a defense closely allied to that of privileged comment, is that the onus of proving both express malice and falsity rests upon the plaintiff. [Edwards v. Chandler, 14 Mich. 475; Konkle v. Haven, 140 Mich. 472; Trimble v. Morrish, 152 Mich. 624; Fowles v. Bowen, 30 N. Y. 20; Ashcroft v. Hammond, 197 N. Y. 488; Peterson v. Steenerson, 113 Minn. 87.]

In some jurisdictions the foregoing rule has been applied generally to the defense of qualified privilege, without distinction as to whether the privilege is invoked in a case of a privileged communication or a privileged comment upon a matter of public interest. This rule is adopted in the following cases: Cornelius v. Cornelius, 233 Mo. 1; Gattis v. Kilgo, 128 N. C. 402; Briggs v. Garrett, 111 Pa. St. 404; Cherry v. Des Moines Leader, 114 Iowa, 298; Coleman v. MacLennan, 78 Kan. 711.

In the case of *Cornelius v. Cornelius*, supra, l. c. 30, LAMM, J., speaking for this court, said: "There is a precept of the law to the effect that slanderous words are *prima facie* untrue. A presumption lies that way. Therefore when the occasion is semi-privileged—i. e., qualifiedly privileged—that presumption is suspended. Its suspension, however, leaves the matter open to proof of express malice, and plaintiff merely carries the burden of proving the accusation was not made in good faith but was false and made maliciously."

In the case of *Gattis v. Kilgo*, supra, l. c. 406, the court said: "And his honor correctly instructed the jury that the publication being admitted and being a qualifiedly privileged one, it was incumbent on the plaintiff to prove by the greater weight of evidence, not only that the publication was false, but that it was also malicious."

Other authorities hold that the burden of proving actual malice in case of a defense of privileged comment, rests upon the plaintiff, but that proof of such malice alone destroys the privilege. [*Gott v. Pulsifer*, 122 Mass. 235; *Cranfill v. Hayden*, 97 Tex. 544; *Atwater v. Morning News*, 67 Conn. 504; *Tawney v. Simonson*, 109 Minn. 341; *Press Co. v. Stewart*, 119 Pa. St. 584; *Crane v. Waters*, 10 Fed. 619; *Newell on Slander and Libel* (2 Ed.), p. 566; 25 Cyc. 402.]

In *Gott v. Pulsifer*, supra, l. c. 238, the court said: "The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comment, however severe its terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action can be maintained without proof of actual malice."

In *Cranfill v. Hayden*, supra, l. c. 562 and 564, in discussing the rule applicable to qualifiedly privileged publications generally, the court said: "When the

court finds that the publication is conditionally privileged, the effect of the holding is to cast upon the plaintiff the burden of proving that malice prompted the act—not merely malice which arises by implication of law, but malice in fact, otherwise denominated actual malice. In other words, if the publication be conditionally privileged, malice is not implied from the mere fact of the publication. . . . Where the alleged libel is conditionally privileged, the defendant may justify either by showing the privilege or by pleading and proving that the statements are true. But malice being proved and the privilege thereby removed, he must fall back upon his justification by proof of the truth of the charges; and we see no good reason why the ordinary rule applied in other cases upon that issue should not be applicable to him.”

On the other hand the doctrine is supported by the highest authority that if facts are stated in the publication upon which the comment is based, and such facts are false, then the defense of privileged comment fails. [Burt v. Advertiser Newspaper Co., 154 Mass. 238; Dunneback v. Tribune Printing Co., 108 Mich. 75; Vance v. Louisville Courier Journal Co., 95 Ky. 41; Evening Post v. Richardson, 113 Ky. 641; Farley v. McBride, 74 Neb. 49; Sweeney v. Baker, 13 W. Va. 158; Belknap v. Ball, 83 Mich. 583; Eikhoff v. Gilbert, 124 Mich. 353; Hubbard v. Allyn, 200 Mass. 166; Post Pub. Co. v. Hallam, 59 Fed. 530; Newell on Slander & Libel (2 Ed.), p. 568; Odgers on Libel & Slander (4 Ed.), p. 187, *et seq.*; Folkard on Slander and Libel, pp. 140 and 148; 25 Cyc. 401, *et seq.*; 18 Am. & Eng. Ency. Law (3 Ed.), 1021.]

In Newell, *supra*, p. 568, discussing the law of qualified privilege of comment, the rule is laid down that: “If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation fails.”

In Burt v. Advertiser Newspaper Co., *supra*, l. c.,

p. 242, it is said: "We agree with the defendant, that the subject was of public interest, and that in connection with the administration of the customhouse the defendant would have a right to make fair comments on the conduct of private persons affecting that administration in the way alleged. But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case a bona fide statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libelous, he will not be privileged if those facts are not true."

In *Dunneback v. Tribune Printing Co.*, supra, l. c., 77, the court said: "Plaintiff was a candidate for a very responsible and important public office. Newspapers had the right to state, for the guidance of electors, any facts which affected his fitness for that office. The newspapers in such cases are not responsible for the inferences to be drawn from such facts. The law of libel requires in these cases that newspapers in their statements of fact observe an honest regard for the truth, and, when they have done so, they are not responsible."

It will be noted that under the rule of the authorities last cited the defense of privileged comment fails upon proof of the falsity of the facts alone, and it is not necessary that the plaintiff should prove in addition thereto that the publication was inspired by actual malice, as in the case of a defense of privileged communication. It should be observed further that under all the rules stated, proof of the falsity of the facts and

knowledge of such falsity is proof of actual malice.

We think there is good reason for recognizing the distinction thus made between the law applicable to the defense of privileged communications and that of privileged comment, making the privilege broader in the former than in the latter. In the former the communication is usually made under a sense of duty and to one person or a limited number of persons. The privilege of comment, on the other hand, while of the highest importance to the public welfare, is not made under a sense of duty, but is purely voluntary, and when the unlimited extent of the publication and the consequent injury to the complainant is considered, it would, in our opinion, be a most dangerous doctrine to require the plaintiff, in order to make a *prima facie* case, to prove not only that the facts were false, but also that the defendant was actuated by express malice.

We think the rule to be deduced from the authorities and in accord with the better reason, is that when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded either by proof that the publication was inspired by actual malice, or that the facts published and commented upon were false. If he fail to prove the one or the other a *prima facie* case will not be made out, and the court, upon the request of the defendant, should give an instruction in the nature of a demurrer to the evidence. These two grounds of attack upon the privilege pleaded are available to the plaintiff in all cases, for in publications commenting upon matters of public interest, facts are always present, stated either expressly or by necessary implication.

Coming to the facts of the case in hand, we find that there was no substantial evidence of actual malice. The plaintiff was relying upon the legal presumption of malice, as in the case of a defense of justification. Therefore the privilege was not removed, as it would

have been by proof of actual malice. The only ground left to meet and defeat that defense was proof that the facts were untrue. Here again plaintiff mistakenly relied upon the general presumption of falsity, which he could well have done if the defense had been justification alone, and not qualified privilege. The defendant, under the defense of justification, assumed the burden of proving the truth of the facts stated, and, as stated in the original opinion, the truth of the facts upon which the comment was made was practically uncontested. At all events there was no proof of their falsity, such as in the absence of proof of malice was necessary to destroy the defense of comment and criticism.

One alleged fact is referred to in the brief of respondent on the motion for a rehearing, for the first time, which deserves notice. The article complained of stated: "The bank's books were examined just before Ex-Secretary of State Cook went out of office, but no action was taken and the bank was left open to take the money of unsuspecting depositors." Respondent now contends as to that part of the article that: "It is necessarily implied therefrom that plaintiff so kept the bank open until June, 1905, whereas the fact is, undisputed in the evidence, that plaintiff went out of office as Secretary of State on January 9, 1905," etc. Respondent's complaint is untenable for the reason that whether we treat such alleged fact as bearing upon the defense of justification or privilege, the language is not susceptible of the construction that plaintiff was responsible for keeping the bank open after he went out of office, and the evidence was uncontradicted that it did remain open so long as plaintiff remained in office.

After a full reconsideration of this case, we find the motion for rehearing to be without substantial merit, and it is therefore overruled. *Ferriss, P. J.*, and *Brown, J.*, concur.

MARIAH L. CROTHERS v. JOHN L. LAFORCE
et al., Appellants.

Division Two, March 21, 1912.

APPEAL: No Abstract: Ignorance of Rules. Filing a full transcript does not satisfy Rules 12 and 13. There must also be an abstract; and the ignorance of the rules is not a sufficient excuse to prevent a dismissal of the appeal.

Appeal from Texas Circuit Court.—*Hon. L. B.*
Woodside, Judge.

APPEAL DISMISSED.

Covert & Covert and *A. T. McGlashan* for appellants.

Lamar, Lamar & Lamar for respondent.

FERRISS, P. J.—Suit to quiet title under section 650, Revised Statutes 1899. Judgment below for plaintiff.

Appellants filed in this court on December 14, 1908, what purports to be a complete transcript of the record. No abstract has been filed as required by Rules 12 and 13 of this court. The cause was set here for hearing on January 11, 1912. On that day respondents filed a motion to dismiss for failure to file an abstract. Appellants filed a brief on the merits, and the cause was submitted. Counsel for appellants on the same day filed a motion stating that he was ignorant of the rule requiring an abstract, and asking that he now be permitted to file one, or that one be prepared by the clerk of this court at appellants' expense, and that the cause be continued to allow time to prepare such abstract.

We must either live up to our rules or abandon them. This rule, No. 12, is essential to the prompt and proper disposition of cases in this court. It is a lawyer's duty to know and conform to the rules. They are always accessible in the Reports. We have repeatedly held that filing a full transcript does not satisfy the rules. On its face, Rule 12 requires an abstract also in such case. [Whiting v. Lead Co., 195 Mo. 509; Vandeventer v. Goss, 190 Mo. 239, and cases cited.]

We dislike to dispose of a case without looking into the merits, but justice to litigants and lawyers who properly prepare their cases requires us to enforce the rules. This cause is reached for decision in its regular course. The respondent is entitled to have it decided, and stands on the rules.

For the foregoing reasons the appeal is dismissed. *Kennish and Brown, JJ.*, concur.

MARGARET L. WILLIAMS v. MARGARET L.
KEEF et al., Appellants.

Division Two, March 21, 1912.

1. **RESULTING TRUST: Proceeds of Wife's Land: Presumption.** As the law stood in 1867 the husband had a right to reduce to his possession, and to become the absolute owner of, the proceeds of a sale of his wife's real estate not held by her as a separate estate; and if he used the money arising from a sale of her land to purchase other land and took the title in his own name, it will be assumed that he intended to reduce the money to his possession and did so with her consent, in the absence of a showing of any agreement between them that he took the property as her agent or trustee.
2. ———: **Long-Settled Titles.** It is not the policy of the law to allow long-settled titles to be easily disturbed. The evidence should be strong enough to remove all doubt that the husband, who used the proceeds of the sale of his wife's land to buy other land and took the title in his own name, in whom it was permitted to remain for thirteen years prior to his death

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and twenty-seven years thereafter, did not intend to reduce said proceeds to his own use, but in taking the title in his own name was acting as her agent or trustee.

3. ———: **Evidence: Proximity of Sale and Reinvestment.** The fact that the husband and wife sold her land, and two days later he bought another tract and took the title in his own name, does not afford a basis for an inference strong enough to overcome the presumption that he intended to convert the money to his own use and that she assented thereto.
4. ———: **Old Recollections.** Recollections of casual remarks made by a deceased grantee as to the actual owner of the land, made from twenty-eight to forty years prior to the trial, are extremely unreliable as tending to establish a resulting trust in the grantee's wife.
5. **PLEADING: Insufficient: Objection First on Appeal.** It would be unfair to treat as fatal an objection, made for the first time in the appellate court, to the form of an answer, which objection could have easily been met by an amendment in the trial court.

Appeal from Carroll Circuit Court.—*Hon. John P. Butler*, Judge.

REVERSED.

John S. Crawford and *Jones & Conkling* for appellants.

(1) The evidence is not sufficient to support the judgment. Evidence to establish a resulting trust must be so clear, strong and convincing as to leave no reasonable doubt in the mind of the chancellor as to the existence of the trust. The evidence does not measure up to that standard. *Burdett v. May*, 100 Mo. 13; *Smith v. Smith*, 201 Mo. 547; *King v. Isley*, 116 Mo. 155; *Garrett v. Garrett*, 171 Mo. 155; *Modrell v. Riddle*, 82 Mo. 31; *Philpott v. Penn*, 91 Mo. 38; *Kennedy v. Kennedy*, 57 Mo. 73; *Ringo v. Richardson*, 53 Mo. 386; *Rogers v. Rogers*, 87 Mo. 257; *Bradley v. Bradley*, 119 Mo. 61; *McFarland v. Laforce*, 119 Mo. 585; *Curd v. Brown*, 148 Mo. 82; *Viers v. Viers*, 175 Mo. 444; *Reed v. Sperry*, 193 Mo. 167; *Johnson v. Quarrels*, 46 Mo. 423; *Woodford v. Stevens*, 51 Mo. 443. (2) Under the

law, as it existed in 1867 when respondent's forty acres of land was sold to Allison, it not being her separate estate, if her husband, John F. Winkler, took the proceeds into his possession and under his control, it became his absolute property, and if he invested such proceeds in the land in controversy and took the deed in his own name, it became his absolutely. *Smith v. Smith*, 201 Mo. 549; *Bank v. Fry*, 168 Mo. 508; *Tillman v. Tillman*, 50 Mo. 40; *Woodford v. Stevens*, 51 Mo. 443; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Leete v. Bank*, 141 Mo. 574; *Modrell v. Riddle*, 82 Mo. 36; *Sloan v. Torry*, 78 Mo. 626; *Dillenger v. Wrisberg*, 10 Mo. App. 465.

Lozier, Morris & Atwood for respondent.

(1) There is abundant evidence to support the finding and decree of the chancellor. *Hammons v. Renfrow*, 84 Mo. 341; *Clark v. Clark*, 86 Mo. 122; *Botts v. Gooch*, 97 Mo. 90; *McCoy v. Hyatt*, 80 Mo. 134; *Woodford v. Stephens*, 51 Mo. 447; *Robert v. Walker*, 101 Mo. 601; *Holthaus v. Hornbostle*, 60 Mo. 439; *Bank v. Fry*, 168 Mo. 492; *McMunnigal v. Aylor*, 204 Mo. 28; *Admr. v. Walker*, 25 Mo. 375; *Kidwell v. Kirkpatrick*, 70 Mo. 216; *Pensenneau v. Pensenneau*, 22 Mo. 27; *Alkire Co. v. Ballenger*, 137 Mo. 369; *Freeland v. Williams*, 220 Mo. 217; *Depas v. Mayo*, 11 Mo. 319; *Bank v. Nichols*, 235 Mo. 401. (2) The amended separate answer of Margaret Lee Keef does not controvert the allegations in respondent's bill, and they are, therefore as to her, taken as confessed, under the statute. Secs. 604 and 628, R. S. 1899; *Dazell v. F. & C. Co.*, 176 Mo. 279; *Bales v. Bennington*, 136 Mo. 528; *State v. Club*, 200 Mo. 65.

FERRISS, P. J.—Appeal from a judgment of the circuit court of Carroll county, declaring a resulting trust in favor of plaintiff in forty acres of land. Here are the facts:

In April, 1866, there was conveyed to plaintiff, who was then the wife of John F. Winkler, by general warranty deed, a certain forty acres in section 33, township 52, in Carroll county. On August 24, 1867, the plaintiff joined her said husband in a warranty deed conveying this forty acres to one Allison for a recited consideration of \$1000. On August 26, 1867, said John F. Winkler purchased from one Thompson forty acres in section 6, township 51, and eight acres additional in said township in Carroll county, and received a warranty deed therefor in his own name, of date August 26, 1867, reciting a consideration of \$960. Plaintiff and her said husband took possession of the forty acres purchased from Thompson, and resided thereon together until his death, which occurred in February, 1880, and plaintiff continued in possession thereof up to the time of the filing of this suit in 1907. The eight-acre tract was sold by the Winklers in 1871, both joining in the deed.

John F. Winkler, by his last will, devised all his real estate, consisting of several tracts at his death, including the forty acres purchased from Thompson, aggregating more than two hundred acres, to his wife, this plaintiff, for life, with remainder to his adopted daughter, Mary Winkler; and all his personal property to his wife, absolutely. Upon his death in 1880, the plaintiff administered upon his estate. She inventoried this forty acres bought from Thompson as a part of her husband's estate. Upon final settlement, she was ordered to distribute as directed in the last will. Plaintiff subsequently intermarried with one Asa Williams, who died before 1907. In August, 1907, plaintiff filed this suit against the defendant, Margaret L. Keef, who is the child and only heir of the aforesaid Mary Winkler, now deceased.

In her petition plaintiff alleges that the purchase price, \$1000, paid by Allison for the forty acres pur-

chased by him, the title to which was in her name, was paid to her said husband, John F. Winkler, as her agent and trustee; that she purchased the forty-eight acres aforesaid from Thompson for the price of \$960; that this sum was paid to Thompson by her said husband, as her agent and trustee, out of the funds received by him from the sale of her forty acres to Allison aforesaid; that said forty-eight acres was deeded by the grantors to her said husband without her knowledge or consent, and that she did not know that the deed had been made to him until long after his death; that the title was in his name on the records at his death. She sets out his last will, and the fact of the death of the adopted daughter, and that defendant is the only heir of such daughter. She says that she is the absolute owner of said forty acres so conveyed to her husband, and prays the court to divest the title out of defendant and vest same in plaintiff. This prayer is on the theory that the defendant holds the legal title by descent subject to a life estate in plaintiff.

The answer contains a general denial, alleges ownership in John F. Winkler of the forty acres in controversy, and pleads the Statute of Limitations.

To sustain her case plaintiff introduced evidence of statements made by John F. Winkler concerning this land. She called four witnesses who testified as to their recollection of certain verbal statements made by John F. Winkler at the time of the purchase in 1867, and also subsequent statements made prior to his death in 1880. Some of the alleged statements were made forty years prior to the trial, in 1907, and others twenty-eight years before. Winkler died, as stated, in 1880. James Williams testified that in 1867, when the witness was fifteen years old, he heard a conversation between Winkler and the father of witness, in which Winkler said that he would buy the Thompson land for a home for his wife; that Winkler asked the father of witness whether he thought the Thompson forty acres

worth as much as his wife's forty, and said that he did not want to cheat his wife.

Wm. Winkler testified that when he was twenty years old he was working for John F. Winkler after the purchase, in 1867, of the forty acres in controversy, and that John F. Winkler said to him: "I sold the forty that belonged to my wife and took the money and bought this forty, and I think I made a good deal. I think this forty better than that."

Wm. Marcum, who also worked for John F. Winkler, testified that he heard him say that he bought this forty with his wife's money, and that Winkler once said to witness: "Plow on her forty this evening." When asked what land he referred to, witness said, "A piece of land I suppose she bought afterwards, after he bought this forty." The witness further said he "understood" that Winkler referred to his wife's forty. Witness said that this talk was about a year before Winkler died, which would make the conversation twenty-eight years old. He then said that Winkler died about ten years ago—not more than fifteen. In fact, he had been dead twenty-seven years.

Mrs. Mattie Wilson testified that John F. Winkler always called this land Margaret's forty; that he said it was her forty, and also that he bought it with her money. This witness also said that the conversations were some eight or ten years before the trial.

There was also some testimony to the effect that John F. Winkler had no property of his own of substantial value in 1867. The witnesses testified to sundry conclusions of theirs as to where Winkler got the money and as to who owned the land. But the foregoing is substantially all the testimony competent and material as to declarations by the husband, John F. Winkler.

Plaintiff introduced the various deeds above referred to, also the last will of John F. Winkler.

Defendant introduced the letters of administration granted to plaintiff on the estate of John F. Winkler, together with the inventory and appraisal filed by her, and also her settlements in the probate court.

I. It will be perceived that there is no direct evidence that the \$1000 derived from the sale of plaintiff's forty acres was paid to her husband, nor that he paid for the forty in controversy out of such money, although it is a fair inference that such were the facts. There is no proof at all of any contract, agreement or understanding between Winkler and his wife that he should collect and expend this money as her agent. The deed to her land was dated August 24, 1867. The deed to Winkler for the forty in question was dated August 26, 1867. Upon the inference to be drawn from these dates, in close proximity, and upon the verbal testimony of Winkler's declarations, plaintiff's case rests. It may be further noted that there is no evidence as to the source from which was derived the money paid for the forty acres conveyed to plaintiff in April, 1866. It does not appear that plaintiff had at that time any money from inheritance or otherwise. She held the title to that forty from April, 1866, to August, 1867.

This transaction occurred in 1867. As the law then stood the husband had a right to reduce to his possession, and to become the absolute owner of, the proceeds of a sale of his wife's real estate not held by her as a separate estate. If he used the proceeds of her land, it will be assumed that he intended to exercise such right where, as here, he buys other property in his own name, there being no agreement between him and his wife that he takes such property as her agent or trustee. [Modrell v. Riddle, 82 Mo. 31; Smith v. Smith, 201 Mo. 533; Tillman v. Tillman, 50 Mo. 41.] And it will further be presumed to be with her consent.

[National Bank v. Fry, 168 Mo. 508; Tillman v. Tillman, *supra*.].

The case of Bank v. Nichols, 235 Mo. 401, cited on this point, does not qualify the foregoing proposition. In that case the property of the wife was never reduced to the possession of the husband. He did no more than to join his wife in a receipt for her share of her father's personal estate, which share was never in fact paid to either her husband or herself; but there was conveyed to him some land which she had agreed to accept in exchange for her interest in her father's personalty, and for which exchange she and her husband executed the receipt aforesaid. Furthermore, the husband testified that he never received the deed, and did not consider that he had any substantial ownership in the land.

We do not regard the proximity of the dates of the sale of the land to which plaintiff held title and of the purchase of the forty in her husband's name as affording a basis for an inference strong enough to overcome the presumption that he intended to convert the money to his own use, and that the wife assented thereto.

We regard recollections of casual remarks from twenty-eight to forty years ago as extremely unreliable. It is perhaps possible for a boy fifteen years old to remember for forty years a casual remark made in his hearing concerning a financial transaction in which he has no interest, but it is not evidence substantial enough to disturb titles to land which have been unassailed during all that time. Testimony as to vague and doubtful statements made in casual conversations by the husband as to the ownership by his wife of the property standing in his name is not, in itself, enough to establish a resulting trust.

It is not the policy of the law to allow long-settled titles to be easily disturbed. The evidence should be strong enough to remove all doubt. Furthermore

even were we to give full force to all that is testified by the witnesses, we would doubt its sufficiency. The statements imputed to Winkler do not necessarily recognize ownership in the wife. They certainly do not point to any express agreement with her that he should hold the title for her as her agent or trustee. The record is barren of anything tending to show any such arrangement, or that the wife ever claimed that such relation existed. The views herein expressed are in line with the decisions of this court. [Curd v. Brown, 148 Mo. 83; Philpot v. Penn, 91 Mo. 38; King v. Isley, 116 Mo. 155.] In the last cited case the following rule is cited from a former decision, and affirmed:

“The rule in this court is settled by a uniform line of decisions that parol testimony, in order to accomplish such an object and secure such an end, must be clear, strong and unequivocal; so definite and positive as to leave no room for doubt in the mind of the chancellor as to the existence of such a trust.”

Plaintiff cites Hammons v. Renfrow, 84 Mo. 341, as being “almost identical with the case at bar.” We think counsel misapprehend that case. The court there asserts the proposition that by the law in force in 1867 the proceeds of the sale of the wife’s land became *eo instanti* the absolute property of the husband when they came into his possession, unless by *clear* and *unequivocal* acts of the husband the proceeds which so came to him were so held and managed by him as to exclude same from his common law marital rights. Upon the facts in that case, which radically differ from the facts here, the court finds that the husband held the proceeds as trustee for his wife. Other cases cited by plaintiff (Clark v. Clark, 86 Mo. l. c. 122; McCoy v. Hyatt, 80 Mo. 130; Bank v. Fry, 168 Mo. 492; Rice v. Shipley, 159 Mo. 399) are disposed of upon the facts in each case, but in recognition of the principles of law which we have stated above. The question, then, be-

comes one of fact, and we think the facts in this case fail to establish the claim of plaintiff.

If it was understood and agreed at the time that Winkler should act simply as the agent of his wife in these transactions, it is strange that she should wait twenty-seven years after the time when she must have known that he had taken the title, before asserting a claim. She knew when she filed the inventory, in 1880, that the title was in her husband's name. Why she should let twenty-seven years go by, increasing with time the difficulty of proof it is hard to understand, unless indeed some change in the family relations stimulated this belated claim into activity. We think the case fails for want of proof.

II. The plaintiff claims that the answer of defendant Keef does not sufficiently present the issue discussed above. No objection was made to the sufficiency of the answer before or during the trial. It is now objected that the general denial therein was not in proper form. This objection comes too late. It would be unfair to treat as fatal an objection, made for the first time in this court, to the form of pleading, which objection could have been easily met by an amendment in the trial court.

III. What we have said disposes finally of this case, and it therefore becomes unnecessary to discuss other points presented by appellants. The judgment is reversed and the bill dismissed at plaintiff's cost. *Kennish and Brown, JJ., concur.*

**R. F. MUGAN et al. v. NELLIE WHEELER et al.,
Appellants.****Division Two, March 21, 1912.**

1. **APPEAL: Assignment of Errors.** If the alleged errors of the trial court are set out intelligently and in numerical order in appellant's brief, with the authorities in support of each proposition, Rule 15 of the court, requiring appellant to "separately allege the errors committed by the inferior court," has been sufficiently complied with.
2. ———: **Abstract: Motion Called for in Bill: Printed in Record Proper.** A motion for a new trial, which the bill of exceptions says was made a part thereof and which further says that the motion is not reprinted as a part of the bill since it is printed under abstract of record proper, if in fact it is so printed, will be considered on appeal. But such method of printing the motion is not approved. Its proper place is in the bill of exceptions.
3. ———: **One Exception: Two Motions.** Exceptions saved to one order overruling the motion for a new trial and the motion in arrest, preserve for review the action of the court upon both motions.
4. ———: **Pleading: Departure: Abandoned Petition Not Preserved.** Whether or not the amended petition was a departure from the original petition cannot be considered on appeal, unless the original petition is made a part of the record as a matter of exception.
5. **TRUST ESTATE: Absolute Deed: Pleading: Proof.** A petition alleging that the owner of land conveyed it in trust, to be held by the grantee for the grantor, and that thereafter, at the grantor's request, the said grantee conveyed it in trust to defendant to be held by her for the use of said grantor and his heirs, states a cause of action, without an allegation that such trust was evidenced by some writing. That it was not created by a writing is a matter of defense, or is to be raised by objection to the evidence offered to prove the trust.
6. ———: ———: **Parol Proof.** Deeds absolute and unconditional on their faces cannot be shown by oral evidence to be conveyances in trust. The statute requires an express trust to be evidenced by some writing—which may be either the conveyance itself, or a separate writing.

Appeal from Greene Circuit Court.—*Hon. James T. Neville*, Judge.

REVERSED.

Delaney & Delaney for appellants.

(1) On the evidence the judgment should be for the defendants. The evidence is entirely parol and a trust of the character declared upon cannot be so established. The admission of such evidence is in contravention of Statute of Frauds and of sec. 3416, R. S. 1899—now sec. 2868, R. S. 1909. There is no trust declared in the deeds nor in any other writing. *Lane v. Eurig*, 31 Mo. 75; *Cornelius v. Smith*, 55 Mo. 528; *Mullock v. Mulock*, 156 Mo. 431; *Crawley v. Crafton*, 193 Mo. 421; *Hillman v. Allen*, 145 Mo. 638; *Church v. Albers*, 174 Mo. 331. (2) There can be no recovery by plaintiffs except upon the theory of an express trust. There is no room for a resulting trust or for a constructive trust. The evidence excludes all presumptions and shows an attempt to prove an express trust. So also the amended petition is a statement of a cause of action bottomed on express trust. *Green v. Cates*, 73 Mo. 115; *Heil v. Heil*, 184 Mo. 665; *Crawley v. Crafton*, 193 Mo. 421. (3) A voluntary trust must be created by the donor himself; it cannot be created by the court. Four requisites must concur to create a voluntary trust: 1st, Sufficient words to create it; 2nd, A definite subject; 3rd, A definite object; 4th, The terms of the trust must be sufficiently declared, clearly, free from doubt, ambiguity and not left to conjecture. All of these elements are lacking in this case. *In re Soulard Estate*, 141 Mo. 642.

Hamlin & Seawall for respondents.

(1) This cause having been submitted on a demurrer to the evidence, every intendment and presumption

is now in favor of the judgment, therefore, appellants' contention that the evidence was not sufficient to establish a resulting trust is not well taken. Where there is conflicting evidence, the court requires that the evidence to establish a resulting trust should be stronger than in a case where it is submitted on a demurrer to the evidence. (2) In determining whether this should be considered an express or resulting trust, as the case was submitted on a demurrer to the evidence, every intendment and presumption will be in favor of the idea of a resulting trust. If the appellant wishes to submit the case on the theory that every presumption is against him he cannot complain of that theory on appeal. (3) That this should be considered a resulting trust and that the judgment should be affirmed, we think it shown conclusively: *Peacock v. Nelson*, 50 Mo. 261; *Baumgartner v. Guessfeld*, 38 Mo. 37. It is undisputed that this property was paid for by all of these parties, and this case having been submitted on a demurrer to the evidence, that is a conclusive presumption. *Shaw v. Shaw*, 86 Mo. 598.

KENNISH, J.—This is an appeal from a judgment of the circuit court of Greene county in favor of plaintiffs. Defendants appeal. Plaintiffs and defendants are the children and heirs of Patrick Mugan, deceased.

It is alleged in the amended petition that Patrick Mugan died on the —day of November, 1905; that on the —day of —, 1893, he was the owner of the land in controversy, situated in said county and particularly described in the petition, being a tract of about six acres; that in the year 1893 the said Patrick Mugan conveyed said property to his daughter, Eliza Banfield, one of the plaintiffs herein, in trust, to be held by her for him, and that said Eliza Banfield, at her father's request, conveyed said property to her sister, Molly Mugan, one of the defendants, "to be held in trust by

the said Molly Mugan for the use and benefit of said Patrick Mugan and his heirs;" that plaintiffs have requested Molly Mugan to convey to them their interest in said property, but that she has refused so to do, etc. The prayer of the petition is that the court divest the said Molly Mugan of the title to said real estate, or decree that she holds the same in trust for each and all of the plaintiffs and defendants, and that the court order said real estate sold and the proceeds divided as each party's interest may appear, and for general relief:

I. Respondents raise two preliminary questions which require attention, before considering the errors assigned by the appellants.

(a) It is urged that the appeal should be dismissed for the reason that appellants have failed to comply with Rule 15 of this court, providing that appellant "shall separately allege the errors committed by the inferior court," etc. An examination of the appellants' brief has satisfied us that this objection is not well founded. The brief sets out the alleged errors of the trial court intelligently and in numerical order, with the authorities in support of each proposition, and that is all that is required. [Wallace v. Libby, 231 Mo. 341.]

(b) Respondents also contend that "the judgment should be affirmed because appellants have not incorporated their motions for a new trial in the bill of exceptions, as printed in the abstract of the record and filed in this court, nor the order of court, if any, filing and overruling same."

What purports to be the bill of exceptions in the printed abstract consists largely of a recital as to orders, motions and rulings, following which, instead of setting out such order, motion or ruling, there is a note referring to the abstract of the record proper where they may be found, and they do appear on the

page of the record proper as stated. As illustrating the condition of the record purporting to be the bill of exceptions, we shall set out only that part referring to the motions for a new trial. It is as follows: "Said motions for new trial and rehearing are in words as follows: (Note: Said motions for new trial are set forth in the bill of exceptions, but as same are printed under abstract of record at pages 15-20, the repetition is omitted here.)"

This court has many times held that the proper place for all matters of exception, as set forth in the printed abstract of the record filed in this court, is in the bill of exceptions, and not in the record proper. There is no authority for taking what is matter of exception out of its place in the bill where it belongs and transposing it to the record proper where it does not belong, nor is there any economy in so doing, although it works a great inconvenience to this court. Were this a question of first impression, the sufficiency of this abstract, at least as to the bill of exceptions, would be a matter of grave doubt. However, in the case of *Booth v. Railroad*, 217 Mo. l. c. 715, upon facts almost identical with those before us, this court said:

"But the counsel say that on page 17 the motion appears to have been copied into the record proper where it had no lawful place. It is true the motion had no lawful place in the record proper and if it was not in fact set out or called for in the bill of exceptions it would avail the appellant nothing. But the abstract of the bill of exceptions signifies that the motion was copied therein, and the reference to another page where it is printed in full was only to save the useless trouble and expense of printing it a second time."

Under the authority of the *Booth* case we rule this point against the respondents.

The bill of exceptions does show that the motions for a new trial were filed by the defendants in due

time, that they were overruled by the court and that exceptions were saved to the action of the court in overruling them. Exceptions thus saved to one order of the court overruling two motions will preserve for review the action of the court upon both motions. [Sotham v. Drovers Telegram Co., 239 Mo. 606.]

II. The case was tried upon an amended petition. The original petition therefore became an abandoned pleading, and could only be made a part of the record as a matter of exception. It was not so preserved, and for that reason the question whether the amended petition is a departure from the original cannot be considered. [Railway Co. v. Bank, 212 Mo. 1. c. 517; Forrister v. Sullivan, 231 Mo. 345; Rule 9, Rules of this Court.]

III. The petition alleges that the property was conveyed by the grantor, Patrick Mugan, to Eliza Banfield, "in trust, to be held by her for him, and that on the — day of — said Eliza Banfield, at the request of her father, Patrick Mugan, conveyed said property to her sister, Molly Mugan, to be held in trust by the said Molly Mugan for the use and benefit of said Patrick Mugan and his heirs."

Appellants contend that as there was no allegation of fraud or mistake in the conveyance, nor that the deeds were intended as mortgages, the petition fails to state a cause of action.

The petition states a cause of action upon the theory that the conveyance created an express trust in the defendant Molly Mugan, and although the statute (sec. 2868, R. S. 1909) provides that such a trust shall be proved only "by some writing signed by the party who is, or shall be, by law, enabled to declare such trusts, or by his last will, in writing," yet it is not necessary that the petition should allege the existence of such written evidence. The presumption is that the

trust pleaded is a vaild one until the contrary appears. That it was not created by written evidence is a matter of defense or to be raised by objection to the evidence offered to prove the trust. [Phillips v. Hardenburg, 181 Mo. l. c. 472.] And that was the course adopted by the defendants at the trial of this case.

IV. The deeds introduced in evidence were absolute and unconditional conveyances on their faces, but they were not for that reason incompetent, for the evidence that an express trust was in fact created by the conveyance may have existed in a separate writing: [Hall v. Bank, 145 Mo. 418.] Here we reach the fatal weakness in plaintiffs' case. There was no written evidence whatever in support of the allegations of the petition that the conveyances were made in trust, and the oral evidence offered for that purpose was incompetent and should not have been admitted over defendant's objections. Under the requirements of the statute, only upon written evidence can such a trust be established, and the statute has been uniformly so construed by this court. [Green v. Cates, 73 Mo. 115; Rogers v. Ramey, 137 Mo. 598; Hall v. Small, 178 Mo. 629; Crawley v. Crafton, 193 Mo. 421.]

It follows that the court erred in refusing defendants' instruction in the nature of a demurrer to the evidence, asked at the close of plaintiffs' case, and for that reason the judgment is reversed. *Ferriss, P. J.*, and *Brown, J.*, concur.

JOHN M. HANNA v. THE MINNESOTA LIFE INSURANCE COMPANY, Appellant.

Division Two, March 21, 1912.

1. **CONTRACT: Fiduciary Relation: Insurance Company: Agent.** A general agent for an insurance company made a contract with the company by the terms of which all funds received by the agent were trust funds, not to be used by the agent, but to be remitted to the company. *Held*, that the relation thus formed was a fiduciary one, which was not altered in practice by the fact that when the agent settled with the company under his previous contract containing the same terms, he failed to account for certain first-premium notes and the company allowed him special favors in order to pay for those notes, and that an official of the company soon after the making of the last contract directed the agent to cash all premium notes at once—and this view is strengthened by the fact that after the last contract was made the company wrote the agent a letter calling his attention to the fiduciary clause, censuring him for selling a premium note and failing to reimburse the maker when rejected, and warning him that his conduct was an unlawful conversion of another's property.
2. **PRINCIPAL AND AGENT: Insurance: Authority to Sell Premium Notes.** Authority to a general insurance agent to sell premium notes is not permission to convert the proceeds to the agent's own use.
3. **EMBEZZLEMENT: Trust Fund: Failure to Account: Evidence.** The statute defining embezzlement does not make the failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund. The failure to account may, however, be material evidence tending to establish the act of conversion.
4. ———: **Definition.** Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come.
5. ———: **Proof Covering Part Only of Sum Charged.** The general agent for an insurance company was prosecuted for embezzling three first-premium notes. He took these notes payable to himself, immediately cashed them, paid the sub-agents their commissions and, in violation of his contract with the company making all funds in his hands fiduciary, converted the remainder to his own use. When the applications with

which the three premium notes were taken, were rejected, the sub-agents refunded to the general agent. The agent asserted upon the trial that before this refunding by the sub-agents he had made a claim against the company for reimbursement for sums advanced on account for sub-agents in other transactions and that therefore the money so refunded to him could be retained and he could not be guilty of embezzlement because the whole amount charged had not been converted. *Held*, that a prosecution for the embezzlement of a certain sum can be sustained by showing the embezzlement of any portion of that sum.

6. ———: **When Offense is Completed: Efforts to Atone.** The offense of embezzlement is complete at the time of conversion and is not tolled by subsequent claims or efforts at atonement.
7. ———: **Conversion: Evidence: Criminal Intent.** Where in a prosecution for embezzlement the admitted facts show a conversion of part of the items charged before any counterclaim was made or entertained by the defendant, such conversion is a fact from which the jury would be authorized to infer a criminal intent.
8. **MALICIOUS PROSECUTION: Duty of Court and Jury.** When the facts in an action for malicious prosecution are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions.
9. ———: **Reasonable Doubt: Evidence.** In no case can an action for malicious prosecution be sustained where there was probable cause. *Held*, that in this case there was probable cause.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

REVERSED.

Warner, Dean, McLeod & Timmonds for appellants.

Reed, Yates, Mastin & Harvey for respondents.

ROY, C.—This action for malicious prosecution was brought in the circuit court of Jackson county, resulting in a judgment for plaintiff for \$3500 on the first count and \$8500 on the third count, the second

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count being dismissed by plaintiff. Defendant appeals.

This proceeding is the result of a charge of embezzlement made by the insurance company against plaintiff, who was a member of the firm of Hanna & Redmon, who were the general agents of the company of Kansas City. Redmon was made a party defendant herein, but has been practically ignored as a party defendant by both sides and hereafter, for convenience, unless otherwise necessary, we shall speak of the firm as Hanna, and of the company as the defendant.

The contract, so far as necessary to be stated, was as follows:

This agreement, made this 16th day of January, 1904, between the Minnesota Mutual Life Insurance Company, of St. Paul, Minnesota, first party, hereinafter referred to as the company, and J. M. Hanna and J. B. Redmon, copartners, as Hanna & Redmon, of Kansas City, in the State of Missouri, second party, hereinafter referred to as the agents of the company:

Witnesseth: That the company does hereby appoint the said agents for the purpose of establishing and maintaining an agency in the State of Missouri and in Indian Territory (except the following counties in the State of Missouri, viz.: St. Louis, Jefferson, Ste. Genevieve, Perry, St. Francois, Washington, Crawford, Franklin, Gasconade, Warren, St. Charles, Lincoln, Pike, Audrain, Callaway and Montgomery); the appointment and supervision of local or sub-agents in said territory and of personally canvassing for applications of insurance on the lives of persons who shall be satisfactory to the company, and for the purpose of collecting and paying over premiums on such insurance when effected in person or through local or sub-agents and of performing such other duties as may be required by the company in connection therewith. This appointment and its continuance are based on the following terms and conditions, which are agreed to by each party hereto:

First: The said agents shall act exclusively for The Minnesota Mutual Life Insurance Company, so far as to tender it all risks or applications obtained by them or by any local or sub-agents appointed by them. They shall earnestly and faithfully solicit applications for insurance and to this end will cause the territory herein mentioned to be thoroughly and ably canvassed by them and by their local or sub-agents, to be appointed by them as hereinafter provided, for whose fidelity and honesty and indebtedness, if any, to the company they shall be responsible to the company. They shall be governed in the business of their agency

strictly by the written and printed instructions which they may receive from time to time from the company, consistent with this agreement and their duties hereunder.

Second: Said agents shall keep accurate and regular books of account, of all their local or sub-agents' transactions, for or on behalf of said company, and shall on or before the 10th day of each month, or oftener, if required, transmit to said company a report in detail embracing every item of insurance done by them, or through or under them by local or sub-agents, up to and including the last day of the preceding month, or period since the last report, showing the balance due the company, which balance must be remitted with their monthly or more frequent reports, to the company, by check or draft drawn to the order of the Minnesota Mutual Life Insurance Company. Said report shall show a list of all new policies remaining on hand, and all policies not delivered and paid for within ninety days from the dates respectively of their receipt, by the agent from the company must be returned to the home office.

Said agents agree that all books of account, documents, vouchers, and other books or papers connected with the business of said company shall be the property of the company and at any and all times to be open to the officers of the company, the manager of agencies and other duly authorized representatives, and be freely exhibited for the purpose of examination and shall be immediately returned to the company upon request.

Third: It is expressly agreed and understood that all moneys or securities received or collected for or on behalf of the company by said agents or by any local or sub-agents appointed by them, shall be held by the agents hereby appointed as a fiduciary trust, and shall not be used by them for any purpose whatever, but shall be remitted to the company as provided above.

Fourth: The said agents have no authority on behalf of the company to make, alter, or discharge any contract or waive forfeitures or receive any moneys due or to become due to said company, except on policies and renewal receipts signed by an officer of the company, sent them for collection, or on other written authority.

They shall have no authority to accept or receipt for any renewal premium for which the regular receipt signed by the secretary or other officer is not then in their possession, nor shall they have any authority to accept any new or renewal premiums past due, otherwise than conditionally upon the approval of the company.

Fifth: Within said territory said agents shall have the right, but by written contract only, to appoint local or sub-agents subject to the approval of the company and to such terms and conditions and to such rules and instructions as the company may establish.

Sixth: In consideration of and conditioned upon the prompt and faithful performance of said agents' duties hereunder, and

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of the performance by their local or sub-agents of their duties and services, as herein provided for, the company agrees:

(a) To allow and pay the said agents commissions upon the first year's premiums paid and collected in cash on policies issued by the company upon applications procured by said agents personally or through their local or sub-agents as follows: Participating policies. On ordinary life, twenty payment life, twenty year endowment, twenty-five year endowment and thirty year endowment, fifteen and twenty year accumulation policies, 75 per cent. Special commission rates on other forms of policies will be fixed and determined by the company from time to time when necessary.

In addition to the commissions above mentioned, the company will allow and pay said agents a bonus of three and 50-100 dollars (\$3.50) on each one thousand dollars of participating insurance, other than term, written and paid for in said territory; said amount to be deducted from the premium before remitting to the company, whenever practicable, or if not so deducted, to be thereafter accounted for and remitted by the company to the agents monthly.

Prior to the 16th day of January, 1904, Hanna was the general agent of the company at Kansas City and with reference to his settlement of his accounts up to the date of the Hanna & Redmon agency, Mr. Palmer, the president of the company, testified, "At the close of the period when the new contract was made, according to the best of my recollection, there were some notes that were not accounted for, and, in order to aid Mr. Hanna in accounting for them, we allowed him a bonus which was not to be paid until his business had been entirely settled for, and bonus was allowed in addition. I do not mean to say Mr. Hanna was guilty of any dishonest practice at all."

Many sub-agents were appointed by Hanna. He and Redmon were both much of the time actively in the field soliciting.

Whenever an application for insurance was obtained, the agent would receive from the applicant the first premium. As a general rule that premium was paid by a note payable to the agent. If Hanna was present the note was made to his order. A receipt for the premium was given the applicant, which contained the following clause: "In case the application shall not

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be approved, the full amount of such payment to be promptly returned to the applicant." The application after being registered in the Kansas City office, was forwarded with the medical examination to the home office. If the application was rejected, the Kansas City office was notified, the notice having these words: "If ——— has given cash or notes in payment of his first premium, kindly reimburse him."

Hanna testified that he always sold the premium notes which he received as soon as received, without waiting for the action of the home office on the application. When the policy was delivered to the applicant the company's receipt was given for the first premium which receipt was required to be countersigned by Hanna & Redmon for every policy issued in their territory.

Plaintiff at the trial testified that just after the contract of January 16th was executed, Mr. O'Shaughnessy, representing the company, told him to cash the premium notes as soon as received; and from that plaintiff claimed he had the right to cash the notes and use the money for his own purpose, repaying the company from time to time in the course of business. Mr. O'Shaughnessy was not a witness; but the following letter was read in evidence and the plaintiff admitted that he received it in the ordinary course of business.

St. Paul, Minn., April 18, 1904.

MESSERS. HANNA & REDMON,

514 Century Building, Kansas City, Missouri.

Gentlemen: We have had numerous communications from Mr. Alvin Grafford of Ulrich, Missouri, since March 2, 1904, and now have received one from his attorney, demanding the immediate return of the note for \$86.76 which he gave Mr. Redmon at the time he took his application.

We have written you four or five times on the subject, requesting that the matter be disposed of without further delay, and have promised Mr. Grafford that it would be. I am informed that he gave Mr. Redmon a note when the application

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was taken, and that the note has been discounted at one of the local banks. The application was rejected February 23d and you were promptly notified. The note and the proceeds thereof were received in trust, and certainly could not become the property of the company nor of the agent in whole or any part, until the application was approved and the insurance placed in force. The application having been rejected it followed that neither the note nor the proceeds thereof could ever become the property of the agent or the company, but remains the property of Mr. Grafford and should have been returned to him at once. Allow me to call your attention to the third clause of your contract:

"It is expressly agreed and understood that all moneys or securities received or collected, for or on behalf of the company by said agents or by any local or sub-agent appointed by them, shall be held by the agents hereby appointed as a fiduciary trust, and shall not be used by them for any purpose whatever, but shall be remitted to the company as above provided."

All of the communications of the company on the subject have been absolutely ignored by you, so far as any reference to the same having been made in the letters addressed by you to the home office. You must realize that no company can maintain its reputation and standing before the public, or with the insurance department, and transact business as you have done it in this case, and I am informed by the assistant secretary, that there are two or three other similar cases concerning which he is in correspondence, and you must realize or are liable to, that your failure to take up the note and return it, is not an ordinary breach of contract, but operates as an unlawful conversion of another's property. This matter must have immediate attention, and I trust it will not be necessary to address any more letters to you on the subject.

Very truly yours,

T. R. PALMER, President.

The plaintiff also admitted getting the following letter:

St. Paul, Minn., July 5, 1904.

MESSERS. HANNA & REDMON,

514 Century Building, Kansas City, Mo.

Gentlemen: This morning we received from superintendent of insurance of Missouri, a letter, copy of which is enclosed, also copy of letter from Mr. Crews which insurance superintendent forwarded for our perusal and I likewise enclose a copy of my reply to the insurance department. We have had two or three cases called to our attention where premiums on applications

taken by your agents have not been returned within a reasonable time after your receiving notice of rejection. Is it not possible to avoid these unfortunate conditions which result in complaints against the company? The company has always stood well with the Missouri insurance department and we do not wish to have its good name destroyed if by any possible efforts on our part and that of the company's agents it can be avoided.

Yours very truly,
T. R. PALMER, President.

The amount of business done through the Kansas City office was very satisfactory, but there were complaints from the company as to the accuracy of the reports sent in and as to alleged failure to return premiums to the applicants when applications were rejected or postponed.

On August 19th the company wrote the Kansas City office objecting to some items of office expense, but congratulating them on the amount of business done. About that time Mr. O'Shaughnessy called on Hanna and discussed the situation with him. On August 31st plaintiff sent in his resignation to take effect September 30th, which contained the following:

"I herewith hand you my resignation to take effect September 30, 1904. Under the thirty day clause in the contract, we will be able to clean our business all up by that time, with what we have here on the books by way of margins and bonuses, and what will come in within the next thirty days and what we have due us from our contract. We are advised by our counsel that the contracts with the agents are the contracts of the company, and not with us, and you are holding the contracts and you certainly know what to do. We will gladly furnish you with all the information in regard to the several amounts due from these parties, but I presume you have this or memorandums.

"With kindest regards, I wish to remain,

"Yours,

"J. M. HANNA."

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Following that resignation, the company sent its representative, Mr. Hageman, to make a settlement with various persons whose applications had been rejected and who had paid premiums to Hanna or the sub-agents, and Mr. Hageman about December 13th presented to Hanna a statement of the amounts so paid by it, a summary which is as follows:

"Item 1.	Ellis note May 27	\$155.30
" 3.	Short note July 15	86.73
" 3.	Short note July 15	86.73
" 4.	Clarkson note June 22	129.23
" 5.	O. T. Baffrey	65.98
" 6.	Am'ts paid Hanna by sub-agents	215.08
" 7.	Shortage in report of July 10	45.60
" 8.	Net prems. \$54. Perry pol. \$8.70	62.70

"\$835.87"

The second, third and fourth items of the above statement are the ones on which the criminal prosecution complained of were based.

The dates shown in the above items were the dates of the applications in those respective cases. The plaintiff on the trial testified that he took the notes mentioned in the first four items of that statement payable to himself and immediately cashed them at the local banks, paid the sub-agents half the commissions (37½%) less expenses, and that he made no entry on any book of such items and converted to his own use all except what he paid sub-agents as their commission, and that on the rejection of the applications the sub-agents refunded to him the amounts paid them, which he never accounted for to the company. It should be stated that plaintiff stated in his testimony that he had accounted to the company for \$3.57 of the Plant item.

He also admitted liability for a portion of the other items in defendant's statement.

At the trial of this cause the plaintiff claimed he was not responsible to the company for the above amounts for the reason that the company owed him for amounts which he had paid to applicants who had been rejected by the company in cases where the premiums had been paid by the applicants to the sub-agents but had never been received by Hanna, and also where Hanna had paid to the company "net" premiums collected by sub-agents and not received by Hanna. The "net" premium was what was due the company after taking out the commission. The amounts claimed to be so paid and the names of the sub-agents for whom paid are shown in his statement as follows:

"Kansas City, Mo., October 3, 1904.

"Amount of money paid by J. M. Hanna to agents for the Minnesota Mutual Life Insurance Company:

John M. Woods, Agent	\$100.00
Wm. T. Johnson, "	55.00
W. H. Barnes, "	135.00
G. W. Scott, "	65.00
J. R. Steele, "	40.00
C. J. Gilman, "	24.00
H. A. Bulkley, "	40.00
R. P. Gwinn, "	50.00
W. H. Gephart, "	40.00

"Total, \$549.00"

As bearing on the question of the *bona fides* of that claim, the plaintiff testified at the trial that he had consulted Mr. Bremmerman, a lawyer, who advised him that he was not liable for sub-agents, and that in the settlement of his accounts he could offset the amounts so paid by him against the amounts claimed by the company, and that he told Mr. O'Shaughnessy so in August. On the other hand, he testified as follows:

"Q. I will ask you to tell the jury what statement if any you made to Mr. O'Shaughnessy in the

conversation that you had with him, in reference to any claim you made on the company on account of these matters of money paid out by you? A. Up to that time I had made no claim against the company for these amounts, and I told Mr. O'Shaughnessy I was getting tired of paying out for rejections to sub-agents, and that Redmon wouldn't stand half the loss—that he was always very free with the profits coming in but not with the losses coming in. He said Redmon ought to stand his share of the losses, and I had a talk with Redmon about it while Mr. O'Shaughnessy was in the city, and Redmon said any money paid out by rejections is not mine.

“A. Well, I told Mr. O'Shaughnessy that Redmon refused to pay any part of the losses sustained by the firm, and he agreed with me that he ought to pay his share of the losses. These men that had been rejected would draw sight drafts on the firm of Hanna & Redmon, and I was working most of the time, and when I would come in they would be presented to me and if I had the money in the bank I would pay them, expecting an offset on account with my partner when the profits would come in, but he always managed to get his profits before there was any chance so far as an accounting, and I got tired of that kind of business.”

He also testified as follows:

“Q. Now, then, I understand that after you took this advice—when was it you took this advice of Mr. Bremmerman? A. I presume it must have been July or possibly August; I remember that Mr. Hamilton was away on a vacation, it must have been in July.

“Q. Long before Mr. O'Shaughnessy had the conversation with him to which you have adverted in your testimony? A. Yes, sir.

“Q. Was Mr. Bremmerman as attorney to you consulted in the matter? A. I think so.

“Q. Or in any of the matters connected with this

business? A. No, I think Mr. Hamilton and he talked the matter over.

"Q. Touching your responsibility for the conduct of your sub-agents? A. I think not that particular clause in the contract.

"Q. Now, at the time you consulted Mr. Bremmerman I understood you to say that you were then advised that you were not responsible for moneys paid by applicants to sub-agents in case the application was rejected and the applicant became entitled to have his or their money back; am I right? A. I think so.

"Q. Then after this consultation in July or August, did you ever pay back any claims to applicants of that character? A. I think I did; I think I paid them up until the time I severed my connection with the company.

"Q. So then you did not follow the advice of your attorney? A. Not necessarily, no, sir.

"Q. Then after you got this advice as you claim you got, you did recognize claims by applicants for the return of money they had paid your sub-agents? A. I think I did.

"Q. In case where you had not received the money or any part of it from the sub-agents? A. There was sometimes cases of that kind.

"Q. So then you continued to recognize the responsibility for the conduct of your sub-agents, in these rejections, after you received this advice just as you did before you received the advice? A. I continued to pay those until I found out my partner would not stand for his half of the loss and then I refused to pay.

"Q. You paid until you got tired? A. Yes, sir.

"Q. Until the burden became too great for you to bear according to your opinion what you ought to bear; am I right? A. Yes, sir.

"Q. And then after you left the company you continued to recognize your responsibility for the

claims arising on account of rejections for moneys paid by applicants to your sub-agents during the time you were connected with the business, didn't you? A. I cannot tell you the date I ceased to recognize my responsibility; Mr. O'Shaughnessy sent me a number of policies over to my office."

On August 26th Hanna wrote a letter to his firm in which he said, "I guess we will be able to care for all the kicks that come if we keep up the gait we are on."

With reference to that letter he testified as follows:

"Q. And these kicks which you referred to were demands made by applicants who had paid by cash or note and were rejected, weren't they? A. I think that had reference to the little complaints made by the company to us direct.

"Q. Little complaints about what? A. About us not going down in our pockets and paying the rejections for the sub-agents.

"Q. That referred to demands made on you for rejections on account of sub-agents applications? A. Yes, sir.

"Q. And you then expressed the opinion this way August 26th? A. Yes, sir.

"Q. Five days before you wrote your resignation? A. Yes, sir.

"Q. And you were then of the opinion that if the business kept up the gait you were going, you would be able to pay the demands? A. Yes, sir."

On September 6th Hanna was working for another company and wrote Redmon to come to Pattonsburg, saying among other things, "You and I can pick up enough money to pay everything and have some besides." With reference to that letter he testified:

"Q. What do you refer to by this statement that you and he can pick up enough money to pay everything and have some besides? A. To pay these claims,

these rejected requests of the Minnesota Mutual Life Insurance Company.

"Q. The copartnership at that time was behind on those rejections? A. Yes, sir.

"Q. And it was your idea if you and Redmon could get this money which you refer to, as the easiest you ever saw, up there, that the firm of Hanna & Redmon might be able to pay back these moneys, your rejected requests? A. Yes, sir, exactly what I meant.

"Q. And these very rejected requests included Clarkson, Payne, Ellis and Short? A. Yes, sir, those were the ones I had.

"Q. The four we talked of a while ago? A. Yes, sir.

"Q. At that time you were short and unable to pay? A. I never denied responsibility for the claims.

"Q. You knew you were short then? A. Yes, sir.

"Q. And that is the reason you asked permission to resign? A. Yes, sir.

"Q. Because you were short? A. I had paid off many of my payments."

Mr. Bremmerman, who, according to plaintiff's testimony, was consulted by Hanna and advised Hanna that he could offset the amounts paid by him on account of sub-agents against what was due him from the company, did not testify in the cause.

Mr. Tolle, a lawyer representing the plaintiff, wrote a letter to the company, which contained the following:

"Oct. 17, 1904.

"St. Paul, Minn., Oct. 17, 1904.

"The Minnesota Mutual Life Ins. Co.,

"Gentlemen: Mr. Rosenberger, attorney-at-law, Kansas City, Mo., advised me today that your Mr. O'Shaughnessy has employed him to collect and furnish the local prosecuting attorney sufficient or the necessary data to convict J. M. Hanna, my client, and one of your former managers, on a charge of converting the company's money to his own use in the sum of

about \$800; and also one Johnson on a similar charge in the sum of about \$700.

“In reference to this matter, in so far as Mr. Hanna is concerned, I beg to advise that my understanding of the matter is that Mr. Hanna is entitled to certain moneys to be paid to him from the Minnesota Mutual Life Insurance Co. on account of certain life insurance policies solicited and secured by him for the company upon which he has not received his commission, but that the same are now in the hands of the company's cashier and one Mr. Redmon, and that if Mr. Hanna is indebted to the company, such indebtedness arose out of his contractual relations with the company, which indebtedness, if any there be over and above his claim against the company, he is able, ready and willing to pay.”

In that letter no mention was made of any claim on account of money paid for sub-agents.

Mr. Tolle was a witness in the case. He testified among other things as follows:

“Q. Just what was that advice that you notified Hageman of, in Hanna's presence—that you gave? A. As near as I can remember the advice was that we wouldn't permit Mr. Hanna to pay the amount claimed against sub-agents for the reason that we considered that the sub-agents were not sub-agents of Hanna, but direct employees and agents of the company.

“Q. That of course was on the theory that Mr. Hanna didn't have the money from the sub-agents that that advice was given? A. The effect of that was not discussed so far as I was concerned.

“Q. It would make a vast difference in your opinion, would it not? A. I don't know that it would, because I haven't distinctly in mind all the circumstances that led up to the conversation or what the exact conversation was.

“Q. Was it not their claim that one sub-agent named W. P. Johnson, had on account of one Hiles,

who lives at Holden, in Missouri, collected \$102.80, on an application that had been rejected, and gave Mr. Hanna \$41.12 of that money, and that Hanna had the money and that the applicant wanted it back and the company had to pay it back? A. No, sir.

“Q. That didn’t come out—do I understand you to say that in such a case it would have made no difference in your advice whether or not Hanna had got his share of the commission and kept it, and the application rejected and the man wanted it back, and the company’s share, too. Did you take the position that he was entitled to keep that money? A. My advice at that time was made on specific facts I had before me, and not having these facts now, I don’t know how I can answer your question satisfactorily.

“Q. What facts was it you had? A. I don’t know just the facts that were presented at that time, if at all, and discussed at that time, but my opinion was formed at that time and I don’t remember at this time just exactly what the fact was, or what the definite advice I gave my client was, except generally I refused to permit him to pay money that was due the company from sub-agents.

“Q. Now, to refresh your recollection, you are very certain, are you not, that you didn’t give any such advice in the case where Hanna had in fact obtained the money belonging to the company and his share of the commission from the sub-agent? A. That state of facts wasn’t submitted to me at that time. The only answer I can make is, no such proposition came up, and no such advice was given, unless it was given on specific facts, and not having those facts before me at this time, I don’t remember just what the advice was.”

It will thus be seen that he does not in that evidence discuss the liability of the company to plaintiff for sums paid by plaintiff on account of sub-agents, but confines himself to a denial of plaintiff’s liability

for such items as had not yet been paid by him. It will be noted that Mr. Tolle did not distinguish between a case where the sub-agent had paid to Hanna and those cases where Hanna had not received the money.

Among the instructions, the jury were told that under the agency contract the company was not liable to Hanna on account of any money paid by him to discharge any liability of sub-agents, or liability arising from acts of sub-agents, and also that there was no evidence to show that the company owed Hanna at the date of his conference with Hageman or thereafter, or that it was indebted to him at the time when he received the Ellis, Plank, Clarkson and Short notes, and that Hanna had no right for his own purposes to sell those notes, and had no right to use any part of the proceeds of those notes for his own purposes. The court also instructed that all notes and money received by plaintiff for the company, whether by himself or through sub-agents, were held by him as a fiduciary trust.

The evidence for the plaintiff showed that the criminal prosecutions were carried on at the suggestion of the defendant, and that the defendant threatened the plaintiff with prosecution unless he paid the full amount demanded.

It was admitted on the trial that the fifth item in defendant's statement, known as the Baffrey item, had never been paid by the company and that plaintiff held the Baffrey note.

Plaintiff's evidence tended to show that he expressed a willingness to pay whatever should be found due from him.

The foregoing statement is of facts conceded by the plaintiff. We have not undertaken to present the defendant's contention as to the facts.

I. Counsel for respondent in their brief say, "It is apparent, we say, that there never was any thought between the company and Hanna that their relations

were of a fiduciary character, or that the monetary matters between them were simply matters of accounting to be settled from time to time, until after Hanna left the service of the company and other reasons intervened, bringing about a change of attitude."

The trial court found against them on that proposition, and so do we. It is true that when he settled up on his first contract he failed to account for some notes that had come into his possession under a contract of agency in which were the same terms as in the last contract of agency; and the company permitted him special favors in order to enable him to pay for those notes. But that was no authority for him to repeat the offense, especially when the new contract contained the clause making all funds received by plaintiff a trust fund not to be used by the agents for any purpose whatever, but to be remitted to the company. The plaintiff claims that right after the contract of January 16th, O'Shaughnessy directed him to sell all notes at once. Even if that be true, an authority to an agent to sell is not permission to convert the proceeds to the agent's own use. To make the matter all the stronger, the company on April 18, 1904, wrote plaintiff a letter calling his attention to the fact that he had sold a note and failed to reimburse the party who was entitled to it. That letter called plaintiff's attention specially to the clause in the contract making those notes a fiduciary trust and roundly censured him for not attending to it, and told him that his conduct was "an unlawful conversion of another's property."

II. In *State v. Mispagel*, 207 Mo. l. c. 580, it was held: "It must, however, be observed that our statute does not make a failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund; and while failure to account for such fund may constitute very material evidence tending to establish the act of conversion, yet the failure to account

by no means constitutes the offense of embezzlement of the fund."

"Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come." [State v. Casey, 207 Mo. l. c. 11.]

It was held in State v. Wissing, 187 Mo. 96, that a prosecution for embezzlement of a certain sum could be sustained by showing the embezzlement of any portion of that sum. It is so provided as to money or notes in Revised Statutes 1899, section 2531.

Plaintiff testified that up to the time of his talk with Mr. O'Shaughnessy about the middle of August he had made no claim against the company on account of money paid out for sub-agents.

He further testified that when he wrote on September 6th to Redmon, saying, "You and I can pick up enough money to pay everything and have some besides," he meant that they could pick up enough to pay the Clarkson, Plant, Ellis and Short items. That he knew he was short, and for that reason asked permission to resign. It is thus seen that he made no claim for reimbursements on account of sub-agents until the middle of August when he spoke of resigning. The items which he was charged with embezzling came into his hands from a month to two months before his talk with O'Shaughnessy and before any claim made by him. Instead of taking premium notes payable to the company, he took them payable to himself, immediately cashed them, making no entry on the books, and used the money for his own purposes, except what he paid sub-agents, and that was refunded to him and spent by him. Even if the sub-agents did not refund until after plaintiff claimed the right to hold it, that part which had been converted by him before he made such claim was not affected by such claim.

All authorities hold that the offense of embezzlement is complete at the time of the conversion, and is not tolled by subsequent claims or efforts at atonement.

We, accordingly, refrain from passing on the question of the good faith of plaintiff's claim to offset payments to sub-agents.

The admitted facts show a conversion of part of those items before any such claim was made or entertained in his own mind by the plaintiff. Such conversion was a fact from which the jury in the criminal prosecution would be authorized to infer the criminal intent. [State v. Lentz, 184 Mo. l. c. 239.]

There is no evidence in this cause to rebut such inference.

"When the facts are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions from the court." [Carp v. Insurance Co., 203 Mo. l. c. 351.]

We hold that there was probable cause for the prosecution. In no case can an action for malicious prosecution be sustained where there was probable cause. [Stubbs v. Mulholland, 168 Mo. l. c. 74.]

We find nothing in the case to indicate that on another trial the plaintiff could show a cause of action, hence we reverse the case without remanding it. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court. All the judges concur.

MARY E. HEAD v. NEW YORK LIFE INSURANCE COMPANY, Appellant.

In Banc, March 28, 1912.

1. **INSURANCE: Contract: Foreign Company: Compliance with Local Statutes.** Foreign insurance companies admitted to do business in this State can only contract within the limits prescribed by the statutes of Missouri. Under the license granted by the State they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." The statutes of this State governing the conduct of business by such foreign companies are declaratory of the public policy of the State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations, by annulling all the stipulations which offend the provisions of the statutes.
2. ———: ———: **Place of Making: Law Governing: Conflict of Laws.** Where the initial and consummate stages of the formation of a contract of insurance were begun and ended in Missouri; the application for insurance made there; the contract delivered there, and the premium there paid upon which the obligation of the contract depended, then the contract is a Missouri contract and must be construed by the laws of this State.
3. ———: ———: **Statutes Applicable to Non-Residents.** The statutes of Missouri regulating the business of insurance were intended for the benefit and protection of all persons lawfully in the State and who obtained contracts of insurance there from a company licensed to make such contracts only in accordance with the laws of this State. These statutes are available for the protection of any such persons, though not citizens of Missouri, so contracting in this State.
4. ———: ———: **Subsidiary Contracts.** All subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. Therefore, where a contract of insurance was originally made in Missouri and governed by its laws, and where the present beneficiary in 1904 entered into a loan agreement whereby she borrowed from the defendant insurance company \$2270, and wherein she agreed that the policy in question should be governed and controlled

by the laws of the State of New York, such loan agreement does not constitute a new and valid contract which precludes the present beneficiary from any other redress under the policy than she would be entitled to if it had been settled in accordance with the laws of New York.

5. ———: ———: **Tender or Payment of Part of Unquestioned Sum Due: Accord and Satisfaction.** The payment or tender, under a policy of insurance, of a sum less than the full amount of the unquestioned sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount due.
6. ———: **Payment: Waiver by Beneficiary.** The return to a beneficiary of a policy of insurance upon which a loan had been made, with an indorsement upon the policy that it should be taken for a certain amount of paid up insurance, and the retention of the policy for some time by the beneficiary, does not constitute a waiver of the beneficiary's right to demand a further sum due her under the policy, when she had no knowledge of her legal rights thereunder, never accepted the sum tendered her, transacted none of the business relating to the insurance, and had done nothing, in fact, except to place the policy, when returned, among the papers of the insured.
7. ———: **Forfeiture: Extended Insurance.** Under Sec. 6946, R. S. 1909, which provides for the application of a certain portion of the value of a policy to the purchase of extended insurance upon a failure to pay premiums, where a policy on which there had been a default had a sufficient value to extend it for its full amount beyond the death of the insured, and there was no waiver by the beneficiary of rights thereunder, a recovery of the full amount of the policy, less a loan made thereon, was warranted.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

Lathrop, Morrow, Fox & Moore for appellant.

(1) The contract of insurance involved in this controversy is a contract under and to be construed and settled in accordance with law of the State of New York. The Missouri statute has nothing to do with the case. *London Assurance v. Companhia de Moagens*, 167 U. S. 149; *Gibson v. Insurance Co.*, 77 Fed.

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Rep. 561; Indemnity Co. v. Mfg. Co., 95 Fed. Rep. 111; Insurance Co. v. Dingley, 100 Fed. Rep. 408; Life Ass'n v. Harris, 94 Tex. 35; Story on Conflict of Laws, sec. 279a; Schwartz v. Insurance Co., 18 Minn. 448; Insurance Co. v. Phillips, 102 Fed. Rep. 9; Insurance Co. v. Babcock, 30 S. E. 273; Younge v. Society, 30 Fed. Rep. 902; Perry v. Wright, 41 Atl. 970; 16 Am. & Eng. Ency. Law, 855; Harrington v. Insurance Co., 58 Pac. 182; Insurance Co. v. Brinkley, 29 L. R. A. 712; Insurance Co. v. Hallock, 72 Am. Dec. 379. (2) The settlement of the policy after the default in 1905 was made in strict accordance with the contract of insurance as it existed under the policy loan agreement, and the policy loan agreement was not a contract entered into in Missouri or in any way affected by the Missouri statutes relating to insurance. (3) The acceptance of the policy endorsed for paid up insurance, resulting in the cancellation of the loan made in 1904, and the retention of the policy by the respondent for a period of some nine or ten months without complaint, was an accord and satisfaction as to the payment of the loan and the adjustment of the beneficiary's rights under the policy. 1 Page on Contracts, sec. 50; O'Bryan v. Kinney, 74 Mo. 125; Snider v. Express Co., 63 Mo. 376. (4) The action of the trial court in refusing to give effect to the contract between the parties, evidenced both by the contract of insurance and the policy loan agreement, was a denial of the rights of appellant as guaranteed by article 1, section 10 of the Constitution of the United States and of the Fourteenth Amendment thereto and of sections 15 and 30 of article 2 of the Constitution of Missouri. Insurance Co. v. Debolt, 16 How. 416; Los Angeles v. Water Co., 177 U. S. 575; Railroad v. Texas, 177 U. S. 66; McCullough v. Virginia, 172 U. S. 109; Havemeyer v. County, 3 Wall. 292; Chicago v. Weldon, 9 Wall. 50; Olcott v. Supervisors, 16 Wall. 678; Bank v. Board, 90 Fed. Rep. 7.

Botsford, Deatherage & Creason for respondent.

(1) The question of the situs of contracts in cases where the question of their validity depends upon the laws of the State where they are made does not depend upon the residence of the parties. If two citizens of Iowa and Illinois come into Missouri and buy a parcel of real estate or personal property, or make any other contract in Missouri, the contract rights of the parties are governed upon the question of the validity of the contract and its construction by the laws of Missouri, the same as if either or both lived in Missouri. *Napier v. Insurance Co.*, 100 N. Y. Supp. 1072. (2) The contention of appellant's counsel that its offer to pay eighty-nine dollars to satisfy a liquidated indebtedness for which the judgment was given below for about \$7500, and that that offer of eighty-nine dollars extinguishes plaintiff's liquidated demands, is not supported by anything in the law. 1 Cyc. 319; *Wetmore v. Crouch*, 150 Mo. 671. (3) The propositions of this case that the policies in suit were and are Missouri contracts and that the loan contracts of 1904 made pursuant to the provisions of the policy were not separate contracts from the policies, are amply supported. *Cravens v. Insurance Co.*, 148 Mo. 583; *Insurance Co. v. Cravens*, 178 U. S. 389; *Insurance Co. v. Clements*, 140 U. S. 226; *Whitfield v. Insurance Co.*, 205 U. S. 489; *Smith v. Insurance Co.*, 173 Mo. 329; *Moore v. Insurance Co.*, 112 Mo. App. 696; *Insurance Co. v. Russell*, 77 Fed. Rep. 94; *Insurance Co. v. Twyman*, 92 S. W. 335; *Capp v. Insurance Co.*, 94 S. W. 734; *Horton v. Insurance Co.*, 151 Mo. 604; *Joyce on Ins.*, sec. 194; *Napier v. Insurance Co.*, 100 N. Y. Supp. 1072; *Burridge v. Insurance Co.*, 211 Mo. 158-178. *Milliken v. Pratt*, 125 Mass. 374; *Golden v. Ebert*, 52 Mo. 260; *Richardson v. DeGiverville*, 107 Mo. 422; *Ruhe v. Buck*, 124 Mo. 178; *Reed v. Tel. Co.*, 135 Mo. 661; *Elliott v. Life Assn.*, 163 Mo. 132; *Thompson v. Insurance Co.*,

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169 Mo. 12; *Park v. Insurance Co.*, 26 Mo. App. 511; *Clothing Co. v. Sharpe*, 83 Mo. App. 385; *Pietri v. Sequenot*, 96 Mo. 258. (4) The claim that the endorsement of said eighty-nine dollars by appellant on said Mary E. Head policy was the same as a paid-up policy issued under section 5857, Revised Statutes 1889, cannot be sustained. Said eighty-nine dollars was not the amount due as a paid-up policy on said Mary E. Head policy, by virtue of said section 5857, but under the evidence adduced by the appellant was the amount claimed by appellant to be the entire amount due as a paid-up policy under the laws of New York. There was no new policy issued by appellant under section 5857. Appellant cannot claim under both the statutes of New York and Missouri. (5) Equally erroneous is appellant's proposition that the loan contracts of 1904 had the effect of wiping out the policy in each one of these cases. *Smith v. Insurance Co.*, 173 Mo. 329; *Burridge v. Insurance Co.*, 211 Mo. 158; *Christensen v. Insurance Co.*, 152 Mo. App. 551; *Bloom v. Insurance Co.*, 197 Mo. 513; *State v. Mer. Co.*, 184 Mo. 185. (6) In this case, the policies having contained provisions and stipulations for the making of loans and loan contracts, the loans and loan contracts made in these cases in 1904 cannot be considered as separate loans and loan contracts. *Burridge v. Insurance Co.*, 211 Mo. 158; *Christensen v. Insurance Co.*, 152 Mo. App. 551. (7) Respecting the suggestion and argument of appellant's counsel, that appellant had the right to come into Missouri and make contracts in defiance of law, we submit that the right of contract is not an unlimited, unqualified one, but is always subject to the law in force at the time of making the contract. *Wilson v. Drumrite*, 216 Mo. 325; *Villa v. Rodrigues*, 12 Wall. 339; *State ex rel. v. Insurance Co.*, 152 Mo. 1; *State v. Cantwell*, 179 Mo. 245; *Holden v. Hardy*, 169 U. S. 366; *Harness v. Insurance Co.*, 144 Mo. 413; *Havens v. Insurance Co.*, 123 Mo. 403; *Henry v. Evans*, 97 Mo. 47.

PER CURIAM.—The following opinion by BOND, C., delivered in Division No. 1, is adopted as the opinion of the Court in Banc. All concur except *Graves* and *Ferriss, JJ.*, who dissent.

BOND, C.—Defendant is an insurance company incorporated in New York and duly licensed to do business in the State of Missouri, and for that purpose has established a branch office in Kansas City, Missouri.

Richard G. Head made an application at the Kansas City office of the defendant for two policies of ten thousand dollars each upon his life, payable to his infant son, Richard G. Head, Jr. At the time he made this application, the assured, though born in Missouri, lived on his ranch in Watrous, New Mexico, and was a citizen of that territory. He maintained business interests in Kansas City, Missouri, and was often there attending to the same. He gave the soliciting agent of the defendant a thirty day note, payable to him personally, for an amount equal to the premiums of the two policies. Thereafter the defendant transmitted from its home office to its branch office in Kansas City a policy made out in accordance with this application, dated April 3, 1894, for a twenty year accumulation period and containing the usual stipulations, which, as far as necessary, will be specially adverted to in the opinion.

After these policies had been received at its Kansas City office, they were handed over to the soliciting agent of defendant, who delivered them to Mr. Deatherage, the attorney of the assured, who placed them in his safe, where they remained until the assured returned at the date of the maturity of the note, and took up the note by drawing a draft upon the commission company in which he was a stockholder, in Kansas City, Missouri, which draft he gave to the soliciting agent in exchange for his note, and the soliciting agent turned

it over to the cashier of the defendant in charge of its branch office at Kansas City. At this time the assured received his policies from Mr. Deatherage, who subsequently arranged with the company that the future premiums payable thereon might be sent by the assured from his place of residence in New Mexico. This was done in most instances, though some of the subsequent premiums were paid at Kansas City.

A few years thereafter the assured was appointed guardian of his infant son, and as such guardian and under proper authority from the court he assigned one of these policies, No. 599590, to his daughter, Mary E. Head. Thereafter, to-wit, April 3, 1904, upon application of Mary E. Head, in which the assured joined, the defendant made a loan of \$2270, on said policy under the terms of a loan agreement, which, as far as material, will be adverted to in the opinion. The assured defaulted in the payment of premiums on said policies due April 3, 1905, whereupon certain correspondence between himself and the beneficiary, Mary E. Head, and the defendant took place with reference to the issuance of a paid up policy computed as provided by the statutes of New York. This as far as essential will be referred to in the opinion. Thereupon, the policy in suit was returned to Mary E. Head in the summer of 1905, with an endorsement thereon, that it stood as a paid up policy for eighty-nine dollars. Her father, the assured, died April 8, 1906, and she brought this present action the 20th of September, 1906, in two counts. In the first count she prayed judgment for the face value of the policy less the loan indebtedness of \$2270 and five per cent interest thereon, claiming that she was entitled to that sum under the laws of Missouri. In the second count she prayed judgment on the same policy for the sum of \$1430, which she alleged was its paid up value computed according to the statutes of Missouri after deducting the amount of the aforesaid note and interest.

The defendant answered, denying the payment of any premiums on the policies after April 3, 1905; admitting its incorporation and its license to do business under the laws of Missouri, and its establishment of an office in Kansas City, Missouri, for that purpose, and that it issued the two policies on the life of the assured; but averring that at the time he applied for the same, he was and up until his death continued to be a citizen of Watrous, New Mexico; that his application was accepted in consideration of the agreement, statement and warranties therein contained, which became a part of the contract embodied in the policies issued to him and which provided that the contract made by said policies and said application should be construed according to the laws of the State of New York. The answer set out the provisions of the policies as to the payment of premiums, as to the making of loans, and quoted sections of the New York statutes providing the rule and method for computing the paid up value of policies which had lapsed after being in full force three full years, and it then set out the making of a loan to the beneficiary in the policy in suit, on the 3d of April, 1904, and the deposit of the policy in suit as collateral security for that loan, and the making of a written loan agreement by the beneficiary, and its provisions, that upon default of payment of the interest on said loan or a premium on the policy, the defendant should have the right to continue the said policy without further notice as paid up insurance in accordance with the section quoted from the statutes of the State of New York; and averring that said policy did lapse for the non-payment of a premium, and that defendant exercised its option and continued it as paid up insurance for the sum of eighty-nine dollars, and endorsed it to that effect, and returned it to the plaintiff, and tendered that amount before the institution of this suit, and continued a tender therefor in its answer. The defendant made a similar defense to the second count.

Plaintiff adduced evidence tending to show, that when Mary E. Head, the beneficiary of this policy, received it with the endorsement placed thereon by defendant, she had no knowledge whatever of her rights under said policy, either under the statutes of New York or the statutes of Missouri; that she never accepted the amount tendered her by the defendant. Plaintiff adduced evidence tending to show, that at the time defendant undertook to settle the policies, as hereinbefore stated, there was, according to the rule fixed by the statutes of Missouri (R. S. 1889, sec. 5856), a balance due on said policy sufficient to furnish a single premium for temporary insurance for the full face value of the policy for several years after the death of the assured. Plaintiff also adduced evidence tending to show, that, if the policy had been settled up and a paid up policy reissued therefor according to the method and standard fixed by the statutes of Missouri (R. S. 1889, sec. 5857), the new policy would have been for a much larger sum than eighty-nine dollars.

The case was tried by the court without the intervention of a jury. At the request of plaintiff and over the objection and exception of defendant, the court gave the following declarations of law:

"1. The court instructs the court sitting as a jury that on the uncontradicted facts of the case as they appear from the evidence, the policy of insurance in this action was and is a Missouri contract governable by the laws of Missouri in force at the time of the issuance of said policy, and not governable by the laws of the State of New York.

"2. The court instructs the court sitting as a jury that on the facts shown in the evidence in this case the plaintiff is entitled to recover and that the issues should be found in favor of the plaintiff.

"3. The court instructs the court sitting as a jury that the policy sued on was kept alive by the laws of Missouri to a time subsequent to the death of Richard

G. Head, Sr., by the net value of said policy at the time of his default in 1905, and that plaintiff is entitled to a finding and judgment against defendant for the amount of said policy, or \$10,000 less the sum of \$2270, with interest thereon at five per cent per annum from April 3, 1905, to July 6, 1906, and less also the further sum of \$425 with interest thereon compounded at six per cent from April 3, 1906, to July 6, 1906, and after so computing interest on said three last sums and the principal and interest of said sums are added together, then deduct the total amount of said three sums from said \$10,000 and then the court sitting as a jury should compute interest at six per cent per annum on such balance of \$10,000 so obtained from July 6, 1906, to the day of this finding and judgment, and the sum stated in the finding and judgment should be the amount of the principal and interest of such balance.”

And thereupon rendered judgment in favor of the plaintiff for \$7476.21.

After the overruling of his motion for a new trial and in arrest, defendant appealed to this court, and assigns for error the giving of the foregoing instruction and the refusal of a declaration of law requested by it, that plaintiff was only entitled to recover the tender made in the answer, and that the contract contained in the loan agreement fixed the amount of plaintiff's recovery.

OPINION.

I. It is insisted for appellant that the status of the parties and the transactions between them culminating in the contract of insurance make it the duty of this court to apply to it that interpretation and effect which it would have under the statutes of New York, pleaded in the answer of the defendant. As a basis for this position, defendant alleges, first, that the contract of insurance was not executed at defendant's business office in Kansas City, Missouri, but was completed at its home office in New York City; second, that

even if the contract had been made in Missouri, it would not be available to plaintiff since the assured was not a citizen of that State when the contract was entered into. Unless one or the other of these reasons can be sustained, the contention of appellant resting on them must be denied. It has been repeatedly ruled in this State since the enactment of sections 5856 *et seq.* of the revision of 1889 (now R. S. 1909, sec. 6946) and the Act of 1891 (Laws 1891, p. 75), Revised Statutes 1899, sections 1024 and 1026 (now R. S. 1909, secs. 3037, 3040), that foreign insurance companies admitted to carry on their business in this State, can only contract within the limits prescribed by our statutes, and that in the conduct of the business under the license granted by this State, they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." The effect of these decisions is to write into every insurance contract made by a foreign insurance company, so licensed, in this State all of the provisions of the statutes of this State appurtenant to the making of such contract, and which define and measure the reciprocal rights and duties of the parties thereto. These statutes are declaratory of the public policy of this State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations, by annulling all the stipulations which offend the provisions of the statutes. [Horton v. Ins. Co., 151 Mo. 604; Smith v. Ins. Co., 173 Mo. 329; Burrige v. Ins. Co., 211 Mo. 158; Cravens v. Ins. Co., 148 Mo. 583; Ins. Co. v. Cravens, 178 U. S. 389; Whitfield v. Ins. Co., 205 U. S. 489, affirming Keller v. Ins. Co., 58 Mo. App. 557.]

II. The first inquiry is, where was the contract expressed by this policy made? The only thing done by the assured when he applied for this policy was to

fill out a blank form of application and deliver it to the branch office of defendant at Kansas City, Missouri, and to hand a note or due bill at thirty days, payable to the soliciting agent individually for an amount equal to the premiums to be charged for the policies. This application was sent to New York, and a policy in accordance therewith, based on the agreements therein contained, was returned to defendant's Kansas City office, and by one of its officers in charge handed over to the soliciting agent, who delivered it to the lawyer of the assured (whose office was in the building occupied by defendant).

When the assured returned to Kansas City, at the maturity of his note, he gave a draft on a commission firm engaged in business there, in which he was a stockholder, for the amount of the note, took up the note, and the draft was turned over to the cashier of the defendant. On this trip the assured received his policy from his attorney. It will be perceived that the defendant did not mail its policy to the assured from its home office in New York, but transferred the policy to its branch office in Kansas City, Missouri, where it was as much in the possession of the defendant as it would have been if it had been retained in New York. The defendant's representatives at Kansas City were necessarily invested with full power to deal with the policy as general agents of defendants in this State. Under that authority they delivered the policy to the soliciting agent, who turned it over to the attorney for the assured at that place. This act completed the contract, and rendered defendant liable according to the terms and provisions of the policy.

Under the facts of the present record, the right of the assured to the indemnity provided in the policy resulted wholly from the transactions between the parties in this State. Every step essential to the creation of a contract between them was taken in Kansas City,

Missouri—there the application was made; there, the note was given; and, there, the policy itself was delivered. The obligation thus created was in all respects a Missouri contract, and must be construed by the laws of this State unless the residence of the assured in New Mexico precludes him from the benefit of the law of the State in which his contract was executed.

III. In its regulatory statutes affecting the business of life insurance within its borders, the State of Missouri designed to illustrate and enforce its policy of wholesome control over the conduct of a calling which might otherwise be carried on in an unjust and oppressive manner. The need of insurance facilities is widespread if not universal. So important is this to the welfare and protection of the public that advanced thinkers are asking for governmental action in the matter of affording insurance for life and insurance for aged working men of the community, and governmental action in that respect has been taken in England, Germany, Austria and Switzerland. The importance of this subject has deeply impressed the Legislature and the courts of this State, and is aptly shown by the utterances of this court in *Smith v. Ins. Co.*, supra, p. 340, where VALLIANT, C. J., said: "Our law deems the subject of life insurance one that requires especial protection. . . ." Adding further, "There is a great deal of technical learning in the subject of life insurance and our lawmakers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them cannot avoid." These motives have induced the Legislature to enact and make it the

duty of the courts to enforce the statutes of this State which prescribe, in some measure, the terms of any contracts and the defense thereto which a corporate insurer of lives can make in the transaction of its business in this State under a license granted and containing the limitations prescribed by our laws. There is nothing in the words of the statutes on these topics which tends to show that they were to be operative only in case of contracts made with citizens of this State, and that they were intended to be inoperative on contracts made here with any other persons properly in this State who are capable of contracting and do enter into contracts in this State. This contention of counsel for appellant loses sight of the fact that it was the purpose of the Legislature by these restrictions to prevent the *making* of contracts in this State in violation of its laws and to the injury of the general public. The laws of a State are made for the benefit and protection of all persons whether citizens, inhabitants, transients, visitors or sojourners who are properly within its borders, unless otherwise declared. The prime object of these statutes was to compel insurance companies to enter into fair and equitable contracts. The power to impose these restrictions as a condition for doing business in this State is too well established to be questioned at this late day. [Whitfield v. Ins. Co., 205 U. S. 489, affirming Keller v. Ins. Co., 58 Mo. App. 557.] It was not intended that these checks upon insurance contracts should be released if the assured who entered into a contract in this State in violation of these statutes was not at the time a citizen of the State. If that intention could be supplied by construction, then it would happen that much of the business of a licensed insurance company would be conducted in this State in utter defiance of the very statutory restrictions imposed as a condition of its entrance. In the case at bar the defendant has a branch office in a

great city on the western limits of this State, which is frequented by throngs of visitors and traders from the surrounding States. If the defendant might make contracts in Kansas City with all persons not shown to be citizens of Missouri in violation of the law under which it was admitted to do business in this State, then it would necessarily result that the chief end of the regulating statutes would be thwarted, and defendant would be permitted to use a situs secured in this State for the purpose of making contracts in accordance with its laws, for the wrongful purpose of making contracts in violation of its laws.

We do not think we should inject into these statutes words (not inserted by the Legislature) showing that they are applicable only when citizens of this State are affected. It is not a proper judicial function to import language into the body of a legislative enactment not necessarily required in order to accomplish the purpose of the act. To do this in this case would defeat the objects of the act and open the door to many of the evils which the statute sought to correct. We, therefore, rule that these acts were intended for the benefit and protection of all persons lawfully in Missouri and who obtained contracts of insurance there from a company licensed to make such contracts only in accordance with the laws of this State, and that these statutes are available for the protection of any such persons, though not citizens of Missouri, so contracting in this State. We, therefore, overrule the contention that the Legislature had an unexpressed purpose to exclude strangers within our gates from the protection of our laws.

IV. It is next insisted by counsel for appellant, that, conceding the contract expressed in the policy in suit is construed and governed by the laws of Missouri in vogue at the time it was formed, and that it

was formed originally in Missouri, yet inasmuch as the present beneficiary in 1904 entered into a loan agreement whereby she borrowed from the defendant \$2270, and wherein she agreed that the policy in question should be governed and controlled by the laws of the State of New York, that such loan agreement constituted a new and valid contract which precluded the present beneficiary from any other redress under the policy in suit than she would be entitled to if it had been settled in accordance with the laws of New York. We cannot concur in this view. It is not an open question in this State, that all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change or modify the rights and obligations as they existed under the original contract of insurance. [Burridge v. Ins. Co., *supra*; Smith v. Ins. Co., *supra*.]

V. It is next contended by counsel for appellant that the eighty-nine dollars which the evidence tended to show was the amount of a paid up policy after deducting from the value of the policy in suit all the indebtedness for loans or premiums, is all plaintiff is entitled to receive, for the reason that she requested, in conjunction with her father, that this policy might be settled out on that basis. We have held that this policy by original legal intentment was a Missouri contract and to be wholly governed, construed and controlled by the laws of this State, and that it was neither modified nor altered by the written agreement entered into at the time of the loan made in 1904. It necessarily follows that neither the tender nor payment (if it had been received) of the eighty-nine dollars would preclude the beneficiary from enforcing her rights under this contract according to the laws of Missouri if the

eighty-nine dollars was not all of the sum unquestionably due her at the time. In other words, no tender nor payment of any sum less than the full amount of an unquestioned indebtedness will bar the party from prosecuting a suit for the entire amount due. [Wetmore v. Crouch, 150 Mo. 671, 672, 682, 683; Riley v. Kershan, 52 Mo. 224; Swofford Dry Goods Co. v. Goss, 65 Mo. App. 55.]

Neither can it be urged that the eighty-nine dollars tendered to plaintiff before and by this suit as the full amount of a paid up policy under the New York law, and the fact that the policy was returned to her with that endorsement and retained for some months until after the death of her father, be held to operate as a waiver of any rights to which she was otherwise entitled. Waiver is always a question of intention and rests upon a full knowledge of all the material facts upon the part of the person against whom the defense is interposed. In the case at bar there is no evidence that the present beneficiary had any knowledge or information whatever of her rights under the contract in suit as fixed by the statutes and laws of Missouri; and, hence, there is no evidence that she should have intended to abandon the enforcement of such rights. She never accepted the amount tendered her nor did any act other than to place the policy when it was returned with the aforesaid endorsement among her father's papers, where it remained until he died, some months afterwards. The evidence clearly shows that the whole business relating to this insurance had been done by him, and that she had left the matter entirely in his hands without knowledge or inquiry or the ascertainment of her rights until after his death, when she brought the present action to enforce them.

There was ample evidence adduced on the trial tending to show that, under the section of the statutes providing for the application of a certain proportion

of its value to the purchase of extended insurance, this policy had a value sufficient to extend it for the full amount beyond the death of the assured. The declaration of law, therefore, given by the learned trial judge predicated plaintiff's right to recover the full amount of the policy under the statutes of Missouri, after making the proper deductions, was correct; and the judgment herein is affirmed. *Brown, C.*, concurs.

RICHARD G. HEAD v. NEW YORK LIFE INSURANCE COMPANY, Appellant.

In Banc, March 28, 1912.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

Lathrop, Morrow, Fox & Moore for appellant.

Botsford, Deatherage & Creason for respondent.

PER CURIAM.—The following opinion by *Bond, C.*, in Division No. 1, is adopted as the opinion of the Court in Banc. All the judges concur except *Graves*, and *Ferriss, JJ.*, who dissent.

BOND, C.—The facts in this case are substantially the same as the facts in *Head v. New York Life Insurance Company*, *ante*, p. 403, with this exception, that the plaintiff in this case was the direct beneficiary under the policy as it was originally drawn.

For the reasons given *in extenso* in the former case, the judgment in this case is affirmed. *Brown, C.*, concurs.

SUSAN E. CAMPBELL et al. v. JOHN A. BOYERS
et al., Appellants.

In Banc, March 28, 1912.

1. **APPEAL: Affidavit.** Recitals in the abstract of the record that in due time an affidavit for an appeal was filed, praying an appeal to the Supreme Court, which appeal was granted and allowed, are sufficient to entitle appellant to a hearing of his appeal in the Supreme Court, although neither the affidavit itself nor more of its substance is set out in the abstract.
2. **DEPARTURE: Amended Petition: Original Abandoned: Matter of Exception.** When an amended petition is filed by leave of court, the original petition is abandoned and thereafter can be made a part of the record only as a matter of exception, and if not made a part of the record by exception only the amended petition is before the court on appeal, and the question of whether the amended petition was a departure from the original cause of action is not for consideration.
2. **AMENDED PETITION: Motion to Strike Out: Overruled: No Exception.** If plaintiff files an amended petition and thereupon defendant files a motion to strike it out, and that motion is overruled, to which no exception is saved, and thereafter defendant appears and testifies before the referee, his answer to the original petition, which remained on file and was not withdrawn, must be considered a pleading on file and responsive to the amended petition.
4. **REFEREE'S REPORT: Exceptions: Equity.** Alleged errors growing out of a reference are matters of exception and can only be reviewed when incorporated in a bill of exceptions. Besides, in an equity case a referee's report, like the verdict of a jury, is only advisory, and not binding upon the court.
5. **———: Not Made a Ground for New Trial.** The disposition made of the referee's report is not for consideration on appeal unless the court's action in reference thereto is made a ground in the motion for a new trial.
5. **———: Ruling Excepted to Set Aside.** An appellant cannot be heard in the appellate court to complain of a ruling of the trial court against him which was afterwards set aside. Where the decree and ruling of the trial court upon the referee's report, to which appellant objected and filed his term bill of exceptions, was at the same term of court set aside and for naught held, appellant cannot be heard to urge his objection to that report.

7. **ACCOUNTING: Fraud: Interest: Payments Voluntary: Reimbursement.** Where the entire transaction by which defendant built a house on plaintiff's lot and obtained and foreclosed a deed of trust thereon, was fraudulent and void, defendant is a mere volunteer as to the payment of repairs, insurance, taxes, water taxes and rents collected, and without standing in a court of equity to claim that he be reimbursed for the sums so paid or to interest on the sum named in the deed of trust.

Appeal from St. Louis City Circuit Court.—*Hon D. G. Taylor*, Judge.

AFFIRMED.

*Charles P. Williams, H. A. Loevy and W. A. Kin-
nerk* for appellant.

(1) The judgment in this cause is irregular and unsupported by the record proper in at least two particulars. The record shows that the second amended petition filed after the case had been tried, contained for the first time, a number of allegations that are not contained in the two preceding petitions. No opportunity was ever given to the defendant Boyers to plead to this second amended petition or to offer evidence with respect to these new charges. No answer of the defendant Boyers was ever filed or considered by the court with respect to this second amended petition. The court shut off all debate by the interlocutory decree entered on the same day that the defendant Boyers's motion to strike out was overruled. 2nd: The record shows that the final decree was entered in this case without the court ever having passed upon the report of the referee, which had been filed in the cause. The judgment below, having been improvidently entered without disposing of the foregoing matters, ought to be reversed and remanded. No final judgment can be rendered while issues either of fact or of law remain undisposed of, or before the cause is at issue. *B. S. 1909, sec. 1859; Black on Judgments (2 Ed.), sec. 184; 11 Ency. Pl. & Pr., 864.* (2) The court erred in refus-

ing to allow to Boyers any credit for the interest notes that he paid as the holder of the second deed of trust, and in possession thereof. Nothing is better settled than that he who comes into equity must do equity. The only way Boyers could have gotten any rent or profit out of the property at all was to pay these superior charges accruing under the first deed of trust. If the plaintiffs themselves had kept possession of the property they would have been obliged to pay these charges. They ought not only by the decree be put in a better position than if they had occupied the property and collected the rents and profits. Their loss arising out of the failure to properly construct the building was fixed by the decree, by finding against Boyers in the sum of \$1000. That disposed of the issue of failure of consideration. The decree by reason of the failure to allow for the payment of these several charges, while at the same time allowing for water rates and taxes, is unjust and inequitable. *Rutherford v. Williams*, 42 Mo. 18; *Land Co. v. Jefferson*, 30 Am. St. Rep. 587; *Ruppel v. Bldg. Ass'n*, 158 Mo. 122; *Reed v. Taylor*, 56 Ill. 288; *Albert v. Sanford*, 201 Mo. 132; *Elder v. Bank*, 12 Kan. 238; *Pomeroy's Eq. Jur.* (3 Ed.), sec. 386, 910. (3) There is not sufficient evidence in this case to show that the contract itself to erect the buildings, was entered into or induced by the fraud of Boyers. Under these circumstances, Boyers was entitled as a matter of law, to the profit that he would have made if he had completed the buildings according to plans and specifications. The measure of the plaintiff's damages and the extent of the failure of consideration ought to be arrived at by subtracting from the reasonable value of the building if it had been erected in full compliance with the plans and specifications, the reasonable value of the building as it was actually erected. To the extent of this difference only would there be a failure of consideration entitling the plaintiffs to the cancelation of the mortgage

or to a personal judgment against the defendant. There is absolutely no evidence in this record upon which to compute or found such difference. Therefore, the decree ought to be reversed and the cause remanded. The measure of damages above is correct. *Moulter v. McOwen*, 103 Mass. 587; *Morton v. Harrison*, 20 Jones & S. 305; *Kidd v. McCormack*, 83 N. Y. 391. (4) Under the second deed of trust Boyers was not a volunteer in making the payments of interest accruing under the first deed of trust. The parties making this second deed knew and understood that Boyers was the beneficiary. This was part of the consideration for his building the house. While a sale by an interested trustee may doubtless in proper cases be set aside, yet the fact that the trustee is the real owner of the loan ought not to absolutely destroy the mortgage. It would still stand as an equitable lien upon the land and the holder of that lien in paying off prior liens for his own protection under authority of the second mortgage would not be a volunteer. *Jones on Mortgages* (Rev. Ed), sec. 1772; *Long v. Long*, 79 Mo. 644; *Darst v. Bates*, 95 Ill. 573; *Lantron v. Barr*, 63 Mo. 48; *McQuies v. Peay*, 58 Mo. 56; *Blackburn v. Tweedie*, 60 Mo. 505; *Morton v. Nixon*, 92 Mo. 26.

Robert & Robert for respondents.

(1) No objection was made and no exception was saved to the filing of the second amended petition. Nor to the court's order in overruling defendant Boyers's motion to strike it from the files. Under these circumstances this court will not consider the question. *Grymes v. Lumber Co.*, 111 Mo. App. 358; *Allen v. Railroad*, 126 S. W. 254; *Lewis v. Mining Co.*, 199 Mo. 463; *Carter v. O'Neil*, 102 Mo. App. 391; *Casler v. Chase*, 160 Mo. 418; *Hoffman v. Trust Co.*, 151 Mo. 520; *Ross v. Railroad*, 141 Mo. 390; *Tobacco Co. v. Walker*, 123 Mo. 662; *Jackson v. Railroad*, 80 Mo. 147;

Wilson v. Haxley, 76 Mo. 345; Parsons v. Clark, 98 Mo. App. 28; Lith. Co. v. Fennimore, 84 Mo. App. 228. Nor is any complaint made in the motion for a new trial or in the assignment of errors that the court erred in this particular. Atkinson v. Dixon, 96 Mo. 582. Defendant Boyers had from July 8, 1907, to December 2, 1907, within which to file any pleading to the second amended petition but defaulted. The other defendants filed theirs December 21 and 24, 1906. The plaintiff, with the court's permission, had the right to file the second amended petition and insert in it "other allegations material to the case" at any time before final judgment. R. S. 1909, sec. 1848 (R. S. 1899, sec. 657); Russell v. Sharp, 192 Mo. 270. (2) Boyers was entitled to no setoffs. His answer to the first amended petition was simply a general denial and he filed no answer to the second amended petition. As a matter of fact he should have been allowed nothing under this state of the pleadings. Water Co. v. Neosho, 136 Mo. 498. (3) No credit should have been allowed Boyers for his payments of interest on the \$4200 deed of trust. In the first place he did not plead a setoff or counterclaim. He was at best a mere volunteer. He had no right to "any rent or profit out of the property." The deed of trust which he held was fraudulent and void, as was the whole transaction. He paid the interest (if he did so) to protect his fraudulent deed and to further his scheme to become possessed of the land. There is absolutely no evidence for what reason Boyers paid this interest. The only testimony is that he did pay it. Shumate v. Snyder, 140 Mo. 86; Horrigan v. Wellmuth, 77 Mo. 545; Napton v. Leaton, 71 Mo. 369; Rhodes v. Dickerson, 95 Mo. App. 395; State ex rel. v. Stonestreet, 92 Mo. App. 214. (4) There was an abundance of evidence of fraud upon Boyers's part. To establish fraud it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only suffi-

cient, but in most cases it is the only proof that can be adduced. *Martin v. Estes*, 132 Mo. 402; *Funkhauser v. Lay*, 78 Mo. 458; *Baldwin v. Whitcomb*, 71 Mo. 651; *Hopkins v. Sivert*, 58 Mo. 201; *Massey v. Young*, 73 Mo. 260. (5) A trustee cannot purchase at his own sale. Boyers knew this, hence had defendant McCarthy take the title in her name and delivered to him a quitclaim deed, which he concealed and did not record. This, too, was a part of the whole fraudulent scheme. *Lass v. Sternberg*, 50 Mo. 124; 1 Perry on Trusts & Trustees (6 Ed.), secs. 194-5; 2 Perry on Trusts & Trustees (6 Ed.), sec. 602v.

KENNISH, J.—This is an appeal from a judgment of the circuit court of the city of St. Louis, in favor of plaintiffs, in an equity case. Defendants appealed.

The pleadings are of too great length to be set out in this opinion. In the second amended petition, on which the final decree was entered, it is alleged, in brief: That the plaintiffs are two women, unaccustomed to the transaction of business, and that the defendant Boyers, an architect and builder, was regarded as an old and trusted friend of the family; that plaintiffs owned and resided upon a lot in said city and, with a view of improving the same, conferred with said Boyers and wholly relied upon his advice as to making the proposed improvements; that a written contract was entered into between plaintiffs and said Boyers, by the terms of which, in consideration of the sum of \$4770, Boyers was to remove the old building to the back part of the lot and erect a new brick structure to be used and occupied as flats, on the former site of the building removed; that plaintiffs agreed to execute two trust deeds to said Boyers in payment for said improvement, one for \$4000, to be executed at the date of said agreement, and the other, for \$770, when the work was done; that the old house was removed and the new building erected.

That the said Boyers fraudulently induced plaintiffs to execute the first trust deed for \$4200; and the second trust deed for the balance of the amount to be paid, before the completion of the work, and that plaintiffs, relying upon and having confidence in said Boyers, did as he directed; that an interest note matured at intervals of six months on the first trust deed, and of three months on the second; that plaintiffs thereafter learned that said trust deeds were for borrowed money, of which fact they were ignorant, as they were of all other provisions of the trust deeds at the time of their execution. That said building was so fraudulently constructed by said Boyers and the work so fraudulently done that it was not worth more than one-half of what plaintiffs agreed to pay therefor; that said Boyers as trustee in the second trust deed, caused said property to be advertised and sold, and through his attorney purchased the same, and as such trustee executed a deed therefor to the defendant Mary A. McCarty, who held title as agent for said Boyers; that said Mary A. McCarty had instituted unlawful detainer proceedings against the plaintiffs to recover possession of the property; that none of the other defendants have any interest in the property, except as trustees for said Boyers. Plaintiffs prayed that said second trust deed, the deed from Boyers to defendant McCarty, and an unrecorded quitclaim deed from said McCarty to Boyers, be cancelled and for naught held; that the defendant Freihaut, holder of the first trust deed, be required to credit the sum of \$1815 upon the principal note secured thereby, and for an accounting of rents and profits as to defendant Boyers, and for general relief.

Answers were filed to each of the first and second petitions by all of the defendants, and to the second amended petition by all except defendant Boyers.

The case was tried in December, 1906. At the close of all the evidence the court announced that on

the evidence introduced relief could not be granted upon the pleadings as they stood, and suggested to counsel for plaintiffs that the petition be amended to conform to the proof, whereupon plaintiffs filed a second amended petition which petition defendant Boyers, without having withdrawn his answer, filed a motion to strike out. This motion does not appear in the record. The court took the case under advisement, and on the 8th day of July, 1907, overruled defendant's motion to strike out and rendered an interlocutory decree for plaintiffs. No exception was saved by defendant Boyers to the action of the court in granting leave to file the second amended petition, or to the court's action in overruling the defendant's motion to strike out the same, nor was the court asked for time to file an amended answer thereto. The interlocutory decree ordered, *inter alia*, that defendant Boyers make an accounting of the rents and profits of the property while in his possession, and at the October term, 1907, the court appointed a referee to take such accounting and report his finding to the court. The referee heard the evidence and filed his report, whereupon the court, at the said October term, entered a judgment and decree confirming the report in part and disapproving it in part. During the said October term the defendant Boyers filed his term bill of exceptions to the action of the court in sustaining plaintiffs' oral exceptions to the report of the referee. This bill was duly allowed, signed and filed. Thereafter, and during said October term, the court set aside its judgment and decree based upon the report of the referee, and on December 2, 1907, at the December term of court, entered its final judgment and decree in favor of plaintiffs. The defendants in due time filed their motions for new trial and in arrest, which were overruled, exceptions saved, and a bill of exceptions regularly allowed, signed and filed.

The term bill was not included in the final bill of exceptions, nor was the ruling which had been excepted to and saved in the term bill included as a ground of the motion for a new trial. Each of said bills of exceptions were separately signed and filed and so appear in the abstract of the record.

A third bill of exceptions appears in appellants' abstract, purporting to preserve certain rulings of the court duly excepted to, on a motion to retax costs and to quash executions, but as this alleged bill is unsigned it will not be further noticed.

Other facts will be stated in the course of the opinion in connection with the points discussed.

I. Respondents challenge this court's jurisdiction of this appeal, on the ground that "appellants' abstract does not set forth the affidavits for appeal nor the substance of them," and ask that the appeal be dismissed.

It appears from the recitals in the abstract of the record that in due time an affidavit for an appeal was filed, praying for an appeal to the Supreme Court, which appeal was granted and allowed. Under the decisions of this court that recital is sufficient. [Coleman v. Roberts, 214 Mo. 635; State ex rel. v. Broadus, 216 Mo. 336; Ray County Bank v. Hutton, 224 Mo. 42; Griffin v. Franklin, 224 Mo. 667; State ex rel. Caulfield v. Broadus, 234 Mo. 331.] To sustain their contention, respondents cite the case of Shemwell v. McKinney, 214 Mo. 692, in which, referring to the affidavit for appeal, it is said: "The abstract of the record proper does not show an affidavit for an appeal in this cause, nor does it state the substance of any such an affidavit." That case was correctly decided upon the facts then before the court, and the language quoted was used as applying to such facts and not as stating a general rule of law. In the Caulfield case, supra, the Shemwell case is discussed and former de-

cisions of this court are reviewed, from which the rule is deduced that "it is not necessary to set forth either the affidavit *in haec verba*, or its contents, in order to entitle appellant to a hearing of his appeal in the higher court."

II. Appellants complain that the judgment is not supported by the record, for the reasons (a) that the second amended petition was a departure from the original cause of action, (b) that no opportunity was given defendant Boyers to plead thereto, and (c) that a final decree was entered without the court having passed upon the report of the referee theretofore filed in the cause.

(a) The second amended petition being filed by leave of court, the two former petitions became abandoned pleadings and could only be made a part of the record and have a place therein as matters of exception. [Missouri Pacific Ry. Co. v. Bank, 212 Mo. l. c. 517; Forrister v. Sullivan, 231 Mo. 345; Rule 9, Rules of this Court.] As the two first petitions were not made a part of the record by exception, only the second amended petition can be considered, and therefore the question of departure is not before us.

(b) When the court overruled defendant Boyers's motion to strike out the second amended petition, no exception was saved, nor was a request made for time to file answer thereto. Defendant Boyers thereafter appeared and testified as a witness before the referee. His answer to the first amended petition, which contained a general denial, had not been withdrawn, but remained on file, and under these facts it must be considered as a pleading on file and responsive to the second amended petition. [Robards v. Munson, 20 Mo. 65; James v. Railroad, 69 Mo. App. l. c. 437; Bank v. Umrath, 55 Mo. App. l. c. 50; Wright v. Lessees of Hollingsworth, 1 Pet. 165; Bank of Havelock

v. Western Union Tel. Co., 72 C. C. A. 580; Clarke v. Ohio River R. R. Co., 39 W. Va. 732; 31 Cyc. 460.]

(c) Alleged errors growing out of a reference are matters of exception and can only be reviewed when incorporated in a bill of exceptions. [Rotchford v. Creamer, 65 Mo. 48; Turley v. Barnes, 131 Mo. 548; Meissner v. Ry. Equipment Co., 211 Mo. 112; Bosley v. Cook, 85 Mo. App. 422; Maloney v. Railroad, 122 Mo. l. c. 115.] Besides, it is well settled law that in an equity case a report of a referee, like the verdict of a jury, is merely advisory and not binding upon the court. [Mack v. Wurmser, 135 Mo. 58; Bigham v. Tinsley, 149 Mo. App. l. c. 477; Beard v. Sack, 81 Mo. 610.]

The action of the court as to the referee's report cannot now be reviewed, for two reasons.

First: It was not made a ground of the motion for a new trial, and the rule is that, "No action of the trial court is reviewable on appeal unless it was presented to the trial court in the motion for a new trial, or in the motion in arrest, or unless it appears on the face of the record proper." [St. Louis v. Lawton, 189 Mo. 474; Coffey v. City of Carthage, 200 Mo. 616; Vineyard v. Matney, 68 Mo. 105; Hulett v. Nugent, 71 Mo. 131; Arkansas Land Co. v. Ladd, 103 Mo. App. 83.]

Second: The decree and ruling of the court upon the referee's report, to which defendant Boyers objected and filed his term bill of exceptions, was, at the same term of court, set aside and for naught held, and it is clear that defendant cannot be heard to complain in this court of a ruling against him which was afterwards set aside.

III. The other errors assigned go to the sufficiency of the evidence to support the judgment and decree.

It was shown by the testimony before the referee that defendant Boyers had collected rents in the total

sum of \$961, and that plaintiffs had given him, to apply on taxes, the sum of \$70, in all, \$1031. That he had paid for repairs \$63.34; for water license, \$51; for insurance, \$36.80; for taxes, \$62; and as interest on the \$4200 trust deed the total sum of \$630. In the interlocutory decree the court found that the building had been fraudulently constructed by the defendant Boyers, and adjudged that the latter pay the plaintiffs the sum of \$430, in addition to the rents and profits found due on the accounting ordered. In the final decree the court allowed the defendant Boyers credit for the total sum of \$150 upon the items above set out, and, adding the said sum of \$430 to the sum of \$1031 received by Boyers, less the credit allowed, rendered final judgment against him for the sum of \$1311. Complaint is made that the decree as to the amount so adjudged against defendant Boyers is not supported by the evidence.

As the court had found the entire transaction on the part of Boyers fraudulent and void, he was a mere volunteer as to payment of the items for which credit was refused and without standing in a court of equity to claim that he be reimbursed for the sums so paid. [Shumate v. Snyder, 140 Mo. l. c. 86; Horrigan v. Wellmuth, 77 Mo. 545; Napton v. Leaton, 71 Mo. 369; Rhodes v. Dickerson, 95 Mo. App. 395; State ex rel. v. Stonestreet, 92 Mo. App. 214.]

While the record is much complicated by reason of the numerous amendments of pleadings, motions and bills of exceptions, we think the decree is responsive to the pleadings, is supported by the evidence, and that the record fails to show error against the appellants. Accordingly the judgment is affirmed. All concur, except *Graves, J.*, who dissents.

THE STATE ex rel. JESSE W. BARRETT v.
GEORGE C. HITCHCOCK et al., Judges of the
Circuit Court of the City of St. Louis.

In Banc, March 28, 1912.

1. **SENATORIAL DISTRICTS: Division of State Into: Legislative In Character: State Officers Legislative Body.** The districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts.
2. ———: ———: **By State Officers: Three Essentials.** After a division of the State into senatorial districts has been agreed upon by the Governor, Secretary of State and Attorney-General, and reduced to writing, the Constitution requires three other things to be done before the "statement" shall become effective, namely: first, the members of the body must sign the statement; second, it must be authenticated by the Great Seal of the State and filed in the office of the Secretary of State; and, third, proclamation thereof must be made by the Governor.
3. ———: ———: ———: **Signed by Quorum.** A majority of the three officers authorized by the Constitution to divide the State into senatorial districts, when legally assembled, constitute a quorum to transact business, and a "statement" signed by two of them is legally signed by "the members" within the meaning of the requirement of the Constitution.
4. ———: ———: ———: **Promulgation by Governor: Directory Requirement.** The words of the Constitution declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be binding and effective as if done by the General Assembly," is mandatory, and not merely directory. This court is firmly wedded to the doctrine that constitutional requirements are mandatory rather than directory. It will not undertake to amend the Constitution by whittling it away piecemeal.
5. ———: ———: ———: ———: **Conforms to Other Legislative Requirements.** The said constitutional provision conforms to the general idea that all forms of legislation are supposed to meet with the Governor's approval.

6. ———: ———: ———: ———: **Meaning of the Word Upon.** The word "upon" used in the constitutional provision declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be as binding and effective as if done by the General Assembly," means that the statement or division shall become effective "upon the occasion of," "following upon," "because of," "by reason of," "after and in consequence of" the Governor's proclamation; and that in effect is stating that it shall not become effective until proclamation thereof is made by him.
7. ———: ———: ———: ———: **Presumption that Proclamation was Made.** The language of the Constitution implies an actual proclamation by the Governor—not one by the Attorney-General and Secretary of State. Because the Secretary of State and Attorney-General made up a statement dividing the State into senatorial districts, signed it, and the Great Seal of the State was attached thereto and it was filed in the office of the Secretary of State, as the constitutional provision requires, it will not be presumed that proclamation thereof was made, or that the legal effect was the same as if proclamation had been actually made, in the face of the fact that the Governor did not sign the statement, did not concur in anything that was done, and has persistently refused to make public proclamation of what was done.
8. ———: ———: **Discretionary and Non-Discretionary Powers: Compact: Contiguous, etc.** In the division of the State into senatorial districts the Legislature, or the officers authorized to act upon its failure to act, has no discretion as to three important matters: 1st, as to the number of districts, for there must be 34; 2nd, when a district is to be composed of more than one county, they must be contiguous; and, 3rd, when a district is composed of more than one county, no county shall be divided. The Legislature may exercise a discretion in two matters: 1st, each district is to be made as nearly equal in population as practical, and, 2nd, when a district is to be composed of more than two counties, it shall be as compact as it may reasonably be made; but even that discretion is limited.
9. ———: ———: **Abuse of Discretion: Unequal Population.** Where the population of the State is 3,293,336 and the number of senatorial districts is 34, making the ratio 96,862, and the Constitution requires the population of each district to be "as nearly equal as may be," an apportionment that gives to the city of St. Louis, having a population of 687,029, only six senators, thereby leaving 105,867 persons unrepresented, is an abuse of the legislative limited discretion, and is null and void. But the apportionment of three senators to Jackson county, which had a population of 283,522, was not an abuse of that discretion, for, since no county can be divided, to give it only two would leave a surplus population of 89,798.

10. ———: ———: ———: **Compactness.** Variation in population of the districts, even to the amount of several thousand, will not alone render the apportionment invalid. But where the constitutional requirements both as to equality of population and compactness of territory have not been observed, it is invalid. The counties must be contiguous and as compact as the nature of the work will reasonably permit.
11. ———: ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act.
12. ———: ———: **By State Officers: Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by those officers.
13. ———: ———: ———: **Dividing City into Districts: Circuit Court Compelled by Mandamus: Jurisdiction.** *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by

the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts.

14. ———: ———: ———: ———: ———: ———: Both agreeing to Court's Jurisdiction. *Held*, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause.
15. ———: ———: ———: ———: ———: ———: *Obiter Dictum*. *Held*, by GRAVES, J., that the constitutional power vested in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; and, as the majority opinion specifically holds that the Supreme Court is, on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum*, pure and simple, and binding on no one.

Mandamus.

WRIT DENIED.

W. C. Irwin for relator.

(1) Under section 3 of article 4 of the Constitution, the Supreme Court has jurisdiction to compel the judges of the circuit court of the city of St. Louis to subdivide said city into senatorial districts under an apportionment made in accordance with section 7 of article 4 of the Constitution, where the circuit judges refuse to perform the duty imposed upon them by section 6 of article 4 of the Constitution. *State ex rel. v. Higgins*, 125 Mo. 364; *State ex rel. v. Patterson*, 229 Mo. 364; *State ex rel. v. Patterson*, 229 Mo. 373; *People ex rel. v. Broom*, 138 N. Y. 95; *State ex rel. v. Smith*, 105 Mo. 6; *State ex rel. v. Field*, 107 Mo. 445; *State ex rel. v. Jones*, 155 Mo. 570; *State ex rel. v. Smith*, 172 Mo. 446; *State ex rel. v. Broadbuss*, 207 Mo. 107. The

Supreme Court has jurisdiction by its writ of mandamus to compel the judges of the circuit court to act where it appears that the inferior court has refused to perform its duty. *State ex rel. v. Turner*, 210 Mo. 77; *State ex rel. v. McCamman*, 11 Mo. App. 626; *State ex rel. v. Smith*, 105 Mo. 6; *State ex rel. v. Neville*, 157 Mo. 386; *State ex rel. v. O'Bryan*, 102 Mo. 254; *State ex rel. v. Oliver*, 50 Mo. App. 217; *State ex rel. v. County*, 41 Mo. 221; *State ex rel. v. Field*, 37 Mo. App. 83. And it is immaterial in the case at bar whether the act which the circuit judges are required to perform is a legislative, ministerial or judicial duty, in as much as the power is conferred upon the Supreme court by express constitutional grant. Constitution, sec. 3, art. 6; *State ex rel. v. Higgins*, 125 Mo. 364; *State ex rel. v. Patterson*, 229 Mo. 364; *State ex rel. v. Patterson*, 229 Mo. 373; *State ex rel. v. Broom*, 138 N. Y. 95. (2) Under sec. 7, art. 4 of the Constitution, in the event of the failure of the General Assembly to district the State for senators, the duty devolves upon the Governor, Secretary of State and Attorney-General, and if all three officers are present, a statement of the senatorial districts formed, signed and filed in the office of the Secretary of State by the Secretary of State and Attorney-General, constituting a majority of such officers, and attested by the Great Seal of the State, has the same force and effect as if done by all three officers. 29 Cyc. 1433; *In re State Treasurer*, 51 Neb. 116. The rule is well settled that, where authority is conferred by law upon three or more persons to execute a public trust or agency, and in the execution thereof all are assembled to deliberate, or had notice or opportunity to be present, the act of a majority is binding unless the statute expressly requires the concurrent action of all. *In re State Treasurer*, 51 Neb. 116; *People v. Coghill*, 47 Cal. 361; *State v. Wilksville*, 20 Ohio St. 288; *State v. James*, 4 Wis. 408; *Hopkins v. Scott*, 38 Neb. 661; *State*

v. Bemis, 45 Neb. 724; Williams v. School, 21 Pick. (Mass.) 75; Lank v. Wood, 15 Ill. 256; People v. Nichols, 52 N. Y. 478. When the Governor refuses to participate in the forming, filing, and signing of a statement of the senatorial districts and the same are formed by the Secretary of State and Attorney-General, who filed in the office of the Secretary a statement of the districts signed by them and attested by the Great Seal of the State, and the Governor refuses to proclaim the statement, the proclamation of the Governor is not necessary in order that the statement shall be binding and effectual. 36 Cyc. 966; State v. Click, 2 Ala. 26; Peterman v. Huling, 31 Pa. St. 432; County v. County, 15 Lea (Tenn.), 266. The officer upon whom rests the duty of making a proclamation is conclusively presumed to have promptly and properly discharged that duty. Lepeyre v. United States, 17 Wall. 195; Walsey v. Chapman, 101 U. S. 770. The court conclusively presumes that the proclamation was made on the day it should have been made and will permit no inquiry into extrinsic matters. Lepeyre v. United States, 17 Wall. (U. S.) 195; Walsey v. Chapman, 101 U. S. 770.

Rassieur & Schnurmacher, Jones, Jones, Hocker & Davis and Alroy S. Phillips for respondents.

(1) The statement of the senatorial districts formed by the Governor, Secretary of State, and Attorney-General and filed in the office of the Secretary of State in accordance with sec. 7, art. 4 of the constitution, when proclaimed by the Governor, has the same status as an act of the General Assembly, and is subject to the same rules as a statute as to its construction and validity, and where the judges of the circuit court, city of St. Louis, refuse to proceed in accordance with the duty imposed upon them by sec. 6, art. 4 of the Constitution to subdivide the city into suitable districts thereunder, on the ground that the apportion-

ment contained in the statement is unconstitutional, a proceeding by mandamus to compel them to subdivide the city into suitable districts under the statement, is a proper proceeding in which to pass upon the validity and constitutionality of the statement. Constitution, art. 4, secs. 2, 6, 7, 25; Laws 1882, p. 4; Laws 1892, p. 15; Laws 1901, p. 204; State ex rel. v. Patterson, 229 Mo. 373; State ex rel. v. Roach, 230 Mo. 408; State ex rel. v. Ziegenhein, 144 Mo. 283; State ex rel. v. Warner, 197 Mo. 650, State ex rel. v. Gordon, 236 Mo. 164; State ex rel. v. Roach, 230 Mo. 408; State ex rel. v. Messerly, 198 Mo. 351; State ex rel. v. Nast, 209 Mo. 708; People ex rel. v. Rice, 135 N. Y. 473; People ex rel. v. Supervisors, 147 N. Y. 1. (2) Under the provisions of sec. 7, art. 4 of the Constitution, the statement of the senatorial districts formed by the Secretary of State and Attorney-General and filed in the office of the Secretary of State on April 18, 1911, does not become binding and effectual until proclaimed by the Governor, and in the absence of such proclamation the statement is not binding and effectual and imposes no duty upon the judges of the circuit court, city of St. Louis, to subdivide the city into suitable districts thereunder. 4 Words & Phrases, 4962; 36 Cyc. 965, 1190-1200; Forry v. Ridge, 56 Mo. App. 618. (3) In passing upon the validity of an apportionment of the State for senators made by the General Assembly the courts will not consider the motives of the General Assembly, but will declare the act unconstitutional and void where it plainly appears that in forming the districts the General Assembly has not considered or applied at all to any extent the limitations imposed by article 4 of the Constitution upon the exercise of discretion, or has so grossly abused the discretion to such an extent as to show an entire disregard of the limitations. Where the apportionment is made by the Governor, Secretary of State and Attorney-General, they act in that capacity as public officers and not as a sovereign legislative

body, and the courts will consider their partisan motive and declare their apportionment unconstitutional and void where it plainly appears that they exercised their discretion in an arbitrary, capricious or unreasonable manner for partisan purposes. Constitution, art. 4, secs. 5, 6, 7, 9, 10, 11; *People v. Thompson*, 155 Ill. 451; *People v. Carlock*, 198 Ill. 150; *People ex rel. v. Rice*, 135 N. Y. 473; *People ex rel. v. Broom*, 138 N. Y. 95; *Sherrill v. O'Brien*, 188 N. Y. 185; *State ex rel. v. Cunningham*, 81 Wis. 440; *State ex rel. v. Cunningham*, 83 Wis. 90; *Giddings v. Blacker*, 93 Mich. 1; *Supervisors v. Blacker*, 92 Mich. 638; *Parker v. State*, 133 Ind. 178; *Denny v. State*, 144 Ind. 503; *Brooks v. State*, 162 Ind. 568; *State ex rel. v. Wrighton*, 56 N. J. L. 126; *Harmison v. Commissioners*, 45 W. Va. 179; *People ex rel. v. Rice*, 135 N. Y. 500; *People v. Thompson*, 155 Ill. 451; *Kansas City v. Hyde*, 196 Mo. 498; *State ex rel. v. Philips*, 97 Mo. 331; *State ex rel. v. Gibson*, 187 Mo. 536; *State ex rel. v. Board*, 103 Mo. 22; *State ex rel. v. Adcock*, 206 Mo. 550; *State ex rel. v. Bourne*, 151 Mo. App. 104, *State ex rel. v. Board*, 134 Mo. 296. (4) The facts in the case at bar are sufficient not only to show that in forming the districts the Secretary of State and Attorney-General exercised their discretion in an arbitrary, capricious and unreasonable manner for partisan purposes, but also to show that they have not considered or applied at all to any extent the limitations imposed by article 4 of the Constitution upon the exercise of their discretion and have so grossly abused their discretion as to show an entire disregard of its limitations. *People v. Thompson*, 155 Ill. 451; *State ex rel. v. Cunningham*, 81 Wis. 440; *Sherrill v. O'Brien*, 188 N. Y. 185; *Parker v. State ex rel.*, 133 Ind. 178; *People ex rel. v. Broom*, 138 N. Y. 95; *Giddings v. Blacker*, 93 Mich. 1; *State ex rel. v. Cunningham*, 83 Wis. 90; *State ex rel. v. Cunningham*, 81 Wis. 440; *People v. Rose*, 203 Ill. 46; *State ex rel. v. Board*, 134 Mo. 296.

WOODSON, J.—This is an original proceeding by mandamus, instituted in this court by the relator, seeking to compel the respondents, the judges of the circuit court of the city of St. Louis, to apportion or redistrict said city into six senatorial districts as is required to be done under certain conditions, by section 7, article 4 of the Constitution of 1875.

A petition for an alternative writ of mandamus was filed, and after due consideration it was ordered to issue, and it was made returnable January 2, 1912. The writ was issued and duly served; and upon the return day, the respondents filed their return.

Upon the incoming of the return, the relator filed a motion for judgment on the pleadings; and it will therefore be necessary for a proper understanding of the case to set out the alternative writ, the return and the motion for judgment.

The writ is as follows (formal parts omitted):

“Your petitioner, Jesse W. Barrett, relator herein, respectfully represents that he is a citizen, resident and taxpayer of the city of St. Louis, Missouri, and is a qualified elector in the Fifth precinct of the Twenty-eighth ward of said city, and in the Thirty-second senatorial district of Missouri; and that respondents George C. Hitchcock, J. Hugo Grimm, Daniel D. Fisher, Hugo Muench, George H. Shields, William B. Homer, Charles C. Allen, William M. Kinsey, James E. Withrow, Eugene McQuillin, Leo S. Rassieur and Wilson A. Taylor, are the duly elected, qualified and acting judges constituting the circuit court, city of St. Louis, Missouri.

“Your petitioner respectfully represents that in the year 1910, there was taken the thirteenth decennial census of the United States, and the result thereof as to the State of Missouri was ascertained and made public on September 30, 1910, according to which the State of Missouri has a population of 3,293,335, and the city of St. Louis a population of 687,029; that the next

session of the General Assembly was duly held in the City of Jefferson, as is duly provided by law; that under the provisions of section 7 of article 4 of the Constitution of Missouri, it became the duty of said Forty-sixth General Assembly to revise and adjust the apportionment of the State of Missouri for senators on the basis of such census, but the said Forty-sixth General Assembly failed to district the State for senators as required in said section and adjourned on March 20, 1911, and under the terms of said section it then became the duty of the Governor, Secretary of State and Attorney-General within thirty days thereafter to perform the said duty; that on April 18, 1911, the Governor, Secretary of State and Attorney-General met for this purpose, and in pursuance of said section of the Constitution the Secretary of State and Attorney-General apportioned the State for senators and filed in the office of Secretary of State a full statement of the districts formed by them, including the names of the counties embraced in each district and the numbers thereof, which statement was signed by the Secretary of State and the Attorney-General, was attested by the Great Seal of the State, and reads as follows:

“ ‘Statement of Apportionment of Senatorial Districts.
April 18, 1911.

“ ‘This is to certify that on Tuesday, April 18, 1911, under the provisions of section 7, article 4 of the Constitution of the State of Missouri (the Legislature of the State of Missouri in its session next after the decennial census, 1910, of the United States, had been taken and the result thereof as to this State ascertained, being the regular session of the Forty-sixth General Assembly, having failed to apportion and district the State into senatorial districts), Herbert S. Hadley, Governor of the State of Missouri, Cornelius Roach, Secretary of State of the State of Missouri, and Elliott W. Major, Attorney-General of the State of

Missouri, having had the matter under consideration, did district the State of Missouri for senators and divide said State into thirty-four senatorial districts, as follows:

“ ‘First District: The counties of Atchison, Gentry, Nodaway and Worth.

“ ‘Second District: The county of Buchanan.

“ ‘Third District: The counties of Andrew, Clay, Clinton, DeKalb, Holt and Platte.

“ ‘Fourth District: The counties of Grundy, Harrison, Mercer and Putnam.

“ ‘Fifth, Seventh and Nineteenth Districts: The county of Jackson.

“ ‘Sixth District: The counties of Chariton, Linn, Livingston and Sullivan.

“ ‘Eighth District: The counties of Caldwell, Carroll, Daviess and Ray.

“ ‘Ninth District: The counties of Macon, Marion, Randolph, and Shelby.

“ ‘Tenth District: The counties of Adair, Clark, Knox, Lewis, Schuyler and Scotland.

“ ‘Eleventh District: The counties of Lincoln, Pike, Ralls and St. Charles.

“ ‘Twelfth District: The counties of Boone, Callaway, Cole, Miller and Osage.

“ ‘Thirteenth District: The counties of Audrain, Gasconade, Monroe, Montgomery and Warren.

“ ‘Fourteenth District: The counties of Camden, Cooper, Howard, Moniteau, Morgan and Saline.

“ ‘Fifteenth District: The counties of Johnson, Lafayette and Pettis.

“ ‘Sixteenth District: The counties of Bates, Benton, Cass, Hickory and Henry.

“ ‘Seventeenth District: The counties of Barton, Cedar, Dade, St. Clair and Vernon.

“ ‘Eighteenth District: The counties of Christian, Greene, Stone, and Taney.

“ ‘Twentieth District: The county of Jasper.

“ ‘Twenty-first District: The counties of Dallas, Douglas, Laclede, Ozark, Polk, Webster and Wright.

“ ‘Twenty-second District: The counties of Barry Lawrence, McDonald and Newton.

“ ‘Twenty-third District: The counties of Butler, Carter, Dunklin, Ripley and Wayne.

“ ‘Twenty-fourth District: The counties of Dent, Howell, Oregon, Shannon and Texas.

“ ‘Twenty-fifth District: The counties of Cape Girardeau, Mississippi, New Madrid, Pemiscot and Scott.

“ ‘Twenty-sixth District: The counties of Bollinger, Madison, Perry, St. Francois, Ste. Genevieve and Stoddard.

“ ‘Twenty-seventh District: The counties of St. Louis and Franklin.

“ ‘Twenty-eighth District: The counties of Crawford, Iron, Jefferson, Maries, Phelps, Pulaski, Reynolds and Washington.

“ ‘Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-third and Thirty-fourth Districts: The city of St. Louis.

“ ‘The said State of Missouri was districted for senators and divided into said thirty-four senatorial districts by the vote of Cornelius Roach, Secretary of State, and Elliott Major, Attorney-General, The Governor, Herbert S. Hadley, being present and refusing to vote and also refusing to sign this instrument districting the said State for senators, the same is therefore signed by said Cornelius Roach, Secretary of State, and said Elliott W. Major, Attorney-General, they constituting a working majority of those executive officers empowered under section 7, article 4, of the Constitution of the State of Missouri to perform the duty herein discharged.

“ ‘Done at the city of Jefferson, State of Missouri, the eighteenth day of April, in the year of our Lord one thousand nine hundred and eleven.’

"Your petitioner further respectfully represents that according to the said apportionment, the city of St. Louis is entitled to six senators, and under the provisions of section 6 of article 4 of the State Constitution, the duty is now imposed upon the circuit court, city of St. Louis, to cause the city to be subdivided into districts of compact and contiguous territory, and of population as nearly equal as may be, corresponding in number with the senators to which the city is entitled under said apportionment.

"Your petitioner further respectfully represents that the last subdivision of the city of St. Louis into senatorial districts was made by the circuit court, city of St. Louis, on November 6, 1901, under which the city was subdivided into six districts numbered from twenty-nine to thirty-four inclusive; that since said date the population of the Twenty-ninth district has increased from 95,161, to 152,348, that of the Thirtieth district has decreased from 94,176 to 88,238, that of the Thirty-first district had decreased from 100,929 to 60,568, that of the Thirty-second district has increased from 95,569 to 131,780, that of the Thirty-third has decreased from 94,771 to 90,398, and that of the Thirty-fourth district has increased from 94,732 to 163,762, so that there are now great inequalities in the population of the several senatorial districts of the city, and there is a great need of a new subdivision of the city into districts as nearly equal in population as may be, so as to give to your petitioner and each of the residents of the several districts his or their constitutional right to equality of representation in the State Senate.

"Your petitioner further respectfully represents that on November 29, 1911, he filed in the circuit court, city of St. Louis, a petition respectfully demanding that that court proceed to perform the duty imposed upon it by section 6, of article 4, of the State Constitution,

and subdivide the city of St. Louis under the said apportionment of 1911, into six districts of compact and contiguous territory, as nearly equal in population as may be, as is provided by law; that on December 1, 1911, he appeared before the said judges of said circuit court, in general term assembled, and presented his said petition; and that on December 9, 1911, the said judges of said circuit court, in general terms assembled ordered that the said statement of the districts be for naught held, and refused to perform the said duty on the ground that the apportionment contained in the said statement was unconstitutional, void and ineffectual and imposed no duty upon the said court.

“Your petitioner further respectfully represents that without the aid of this court, through its writ of mandamus, he has no remedy in the premises.

“Wherefore, your petitioner prays that this court issue its alternative writ of mandamus requiring and commanding the said George C. Hitchcock, J. Hugo Grimm, Daniel D. Fisher, Hugo Muench, George H. Shields, William B. Homer, Charles C. Allen, William M. Kinsey, James E. Withrow, Eugene McQuillin, Leo S. Rassieur and Wilson A. Taylor, as judges of the circuit court, city of St. Louis, Missouri, and each of them, without further excuse, refusal or delay, to proceed to perform the duty imposed upon said circuit court by section 6 of article 4 of the State Constitution, and subdivide the city of St. Louis under the statement of the senatorial districts filed in the office of the Secretary of State on April 18, 1911, into six districts of compact and contiguous territory as nearly equal in population as may be, as is provided by law, or that the said George C. Hitchcock, J. Hugo Grimm, Daniel D. Fisher, Hugo Muench, George H. Shields, William D. Homer, Charles C. Allen, William M. Kinsey, James E. Withrow, Eugene McQuillin, Leo S. Rassieur and Wilson A. Taylor, as judges of the circuit

court, city of St. Louis, Missouri, appear before this court and show cause on a day certain, to be named in the writ, why they have not so done, and your petitioner further prays that he may have and recover of respondents his costs in this behalf expended and for such other and further relief as to the court may seem meet and proper in the premises."

The return of respondents is as follows:

"Now come respondents George C. Hitchcock, J. Hugo Grimm, Daniel D. Fisher, Hugo Muench, George H. Shields, William B. Homer, Charles Claffin Allen, William M. Kinsey, James E. Withrow, Eugene McQuillin, Leo S. Bassieur, and Wilson A. Taylor, as judges of the circuit court, for the city of St. Louis, Missouri, and for their return to the alternative writ of mandamus, heretofore issued herein, respectively represent and show as follows:

"That at all the times mentioned in the petition respondents were and still are the duly elected, qualified and acting judges constituting the circuit court, city of St. Louis, Missouri:

"That on April 18, 1911, within thirty days after the adjournment of the Forty-sixth General Assembly of the State of Missouri, which failed to district the State for senators, the Governor, the Secretary of State and the Attorney-General of the State of Missouri, met at the city of Jefferson for the purpose of revising and adjusting the apportionment of the State for senators upon the basis of the United States census of 1910; that the Secretary of State then presented for adoption a statement dividing the State into senatorial districts, which he and the Attorney-general had previously prepared and agreed upon; that the Governor then and there objected to said statement, and to the adoption of the apportionment of the State into senatorial districts therein provided for, on the ground that it was unfair and partisan and did not comply with the requirements of the Constitution for the rea-

sons hereinafter set forth; that the Secretary of State and Attorney-General then refused to consider or approve any plan of apportionment other than the one upon which they had previously agreed, and upon the refusal of the Governor to sign or approve said statement, the Secretary of State and Attorney-General proceeded to organize the meeting for the purpose of adopting said statement of the districts, and nominated and elected each other chairman and secretary respectively of the meeting, the Governor declining to take any part in said organization on the ground, assigned by him, that the approval or disapproval by the Governor, Secretary of State and Attorney-General of any statement dividing the State into senatorial districts should be evidenced by the signing or refusal to sign any such statement, and on the further ground, assigned by him, that the Secretary of State and Attorney-General proposed to proceed in an arbitrary manner to adopt the statement of the districts upon which they had previously agreed as aforesaid, and thereupon, over the objection of the Governor, the Secretary of State and the Attorney-General adopted the apportionment upon which they had previously agreed as aforesaid, which apportionment is contained and embodied in the statement dividing the State into senatorial districts, signed by the Secretary of State and the Attorney-General, and filed in the office of the Secretary of State on April 18, 1911.

“Respondents further respectfully represent and show that the Governor never signed the said statement of the districts and took no part in the filing thereof, and never performed such official acts in regard thereto as to authorize the affixing of the Great Seal of the State thereto; and that the said statement has never been proclaimed by the Governor.

“That the numbers of the districts contained in said statement, their population and that of the several counties composing them, according to the decennial

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census of the United States of 1910, and the official returns of the votes cast in the respective districts, together with the counties composing them, for the Republican and Democratic candidates for the office of judge of the Supreme Court at the general election held November 8, 1910, are as follows:

Dist. No.	County Popula- tion.	District Popula- tion.	1910 Supreme Dem.	Vote for Judge. Rep.	Majority. Dem. Rep.
1	Atchison 13,604		1,504	1,546	 42
•	Gentry 16,820		2,045	1,735	310
	Nodaway 28,833		3,311	2,958	353
	Worth 8,007		990	927	63
		67,264	7,850	7,166	684
2	Buchanan 93,020	93,020	9,569	7,066	2,503
3	Andrew 15,582		1,604	1,926	 322
	Clay 20,302		3,286	919	2,267
	Clinton 16,297		1,909	1,242	667
	DeKalb 12,531		1,590	1,556	34
	Holt 14,539		1,317	1,836	 519
	Platte 14,429		2,317	698	1,619
		92,380	12,023	8,177	3,846
4	Grundy 16,744		1,130	2,211	 1,081
	Harrison 20,466		1,600	2,256	 656
	Mercer 12,335		597	1,456	 859
	Putnam 14,308		777	1,697	 920
		63,853	4,104	7,620	 3,516
5 } 7 } 19 }	Jackson 283,522	283,522	30,051	24,728	5,323
6	Charlton 23,503		2,986	1,845	1,141
	Linn 25,253		2,784	2,754	30
	Livingston 19,453		2,293	2,263	30
	Sullivan 18,598		2,190	2,277	 87
		86,807	10,253	9,139	1,114
8	Caldwell 14,605		1,382	1,939	 557
	Carroll 23,098		2,573	2,769	 196
	Davies 17,605		2,184	2,152	32
	Ray 21,451		2,730	1,337	1,393
		76,759	8,869	8,197	672
9	Macon 30,868		3,414	2,931	483
	Marion 30,572		3,605	2,045	1,560
	Randolph 26,182		3,695	1,460	2,235
	Shelby 14,864		2,176	868	1,308
		102,486	12,890	7,304	5,586

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Dist. No.	County Counties.	Popula- tion.	District Popula- tion.	1910 Vote for		Majority.	
				Supreme Dem.	Judge. Rep.	Dem.	Rep.
10	Adair	22,700		1,726	2,314	.....	588
	Clark	12,811		1,614	1,609	5	.....
	Knox	12,403		1,678	1,194	484	.....
	Lewis	15,514		2,173	1,092	1,081	.....
	Schuyler	9,062		1,138	894	244	.....
	Scotland	11,869		1,327	1,041	286	.....
			84,359	9,656	8,144	1,512	.....
11	Lincoln	17,033		2,379	1,191	1,088	.....
	Pike	22,556		3,122	1,003	1,119	.....
	Ralls	12,913		1,892	705	1,187	.....
	St. Charles	24,695		1,956	3,261	.....	1,309
			77,197	9,349	7,260	2,089	.....
12	Boone	30,533		4,876	1,846	3,030	.....
	Callaway	24,400		3,672	1,709	1,963	.....
	Cole	21,957		2,471	2,310	161	.....
	Miller	16,717		1,345	1,820	.....	475
	Osage	14,283		1,439	1,656	.....	217
			107,890	13,803	9,341	4,462	.....
13	Audrain	21,687		3,267	1,387	1,880	.....
	Gasconade ..	12,847		508	2,212	.....	1,704
	Monroe	18,304		3,242	566	2,676	.....
	Montgomery ..	15,604		2,034	2,019	15	.....
	Warren	9,123		465	1,647	.....	1,182
			77,565	9,516	7,831	1,685	.....
14	Camden	11,582		807	1,269	.....	462
	Cooper	20,311		2,423	2,462	.....	39
	Howard	15,653		2,596	953	1,643	.....
	Moniteau	14,375		1,651	1,633	18	.....
	Morgan	12,863		1,242	1,546	.....	304
	Saline	29,448		3,748	2,423	1,325	.....
			104,232	12,467	10,286	2,181	.....
15	Johnson	26,297		3,260	2,504	756	.....
	Lafayette	26,297		3,536	3,414	122	.....
	Pettis	33,913		3,545	3,609	.....	64
			90,364	10,341	9,527	814	.....
16	Bates	25,869		3,013	2,396	617	.....
	Benton	14,881		1,197	1,810	.....	613
	Cass	22,973		2,802	1,877	925	.....
	Hickory	8,741		505	1,114		609
	Henry	27,242		3,367	2,369	998	
			99,706	10,884	9,566	1,318	

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Dist. No.	County Counties.	County Popula- tion.	District Popula- tion.	1910 Vote for		Majority.	
				Supreme Dem.	Judge. Rep.	Dem.	Rep.
17	Barton	16,747		1,812	1,537	275	.....
	Cedar	16,080		1,549	1,811	.....	262
	Dade	15,613		1,319	1,741	.....	422
	St. Clair	16,412		1,848	1,802	46	.....
	Vernon	28,827		3,282	1,936	1,346	.....
			93,679	9,810	8,827	983	.....
18	Christian	15,832		789	1,760	.....	971
	Greene	63,831		5,263	6,025	.....	762
	Stone	11,559		563	1,248	.....	685
	Taney	9,134		586	987	.....	401
			100,356	7,201	10,020	.....	2,819
20	Jasper	89,673	89,673	7,368	8,299	.....	931
21	Dallas	13,181		838	1,528	.....	690
	Douglas	16,664		540	1,562	.....	1,022
	Laclede	17,363		1,616	1,858	.....	242
	Ozark	11,926		550	1,218	.....	668
	Polk	21,561		1,993	2,367	.....	374
	Webster	17,377		1,780	1,787	.....	7
	Wright	18,315		1,389	1,960	.....	571
			116,387	8,706	12,280	.....	3,574
22	Barry	23,869		2,273	2,368	.....	95
	Lawrence	26,583		2,402	2,848	.....	446
	McDonald	13,539		1,328	1,284	44	.....
	Newton	27,136		2,492	2,454	38	.....
			91,127	8,495	8,954	.....	459
23	Butler	20,624		1,742	2,025	.....	283
	Carter	5,504		453	366	87	.....
	Dunklin	30,328		2,598	1,323	1,275	.....
	Ripley	13,099		1,125	829	296	.....
	Wayne	15,181		1,416	1,266	150	.....
			84,736	7,334	5,809	1,525	.....
24	Dent	13,245		1,314	1,129	185	.....
	Howell	21,065		1,641	2,058	.....	417
	Oregon	14,681		1,481	693	788	.....
	Shannon	11,443		1,096	672	424	.....
	Texas	21,458		2,190	1,650	540	.....
			81,892	7,722	6,202	1,520	.....
25	Cape Girardeau	27,621		2,405	3,258	.....	853
	Mississippi	19,559		1,389	949	440	.....
	New Madrid	19,488		1,614	994	620	.....
	Pemiscot	19,559		1,507	872	635	
	Scott	22,372		1,630	1,287	343	
			103,597	8,545	7,360	1,185	

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Dist. No.	County Counties.	District Popula- tion.	1910 Vote for Supreme Judge.		Majority.	
			Dem.	Rep.	Dem.	Rep.
26	Bollinger	14,576	1,408	1,540	.....	132
	Madison	11,273	1,081	1,061	20	.....
	Perry	14,898	1,520	1,758	.....	238
	St. Francois	35,738	2,881	2,919	.....	38
	Ste. Genevieve.....	10,607	1,123	1,095	28	.....
	Stoddard	27,807	2,576	1,851	725	.....
		114,899	10,589	10,224	365	.....
27	Franklin	29,830	2,424	3,803	.....	1,379
	St. Louis	82,417	4,033	10,673	.....	6,640
		112,247	6,457	14,476	.....	8,019
28	Crawford	13,576	1,223	1,582	.....	359
	Iron	8,563	858	740	118	.....
	Jefferson	27,878	2,654	2,854	.....	200
	Maries	10,088	1,285	593	692	.....
	Phelps	15,796	1,751	1,365	386	.....
	Pulaski	11,438	1,317	844	473	.....
	Reynolds	9,592	1,015	411	604	.....
	Washington	13,378	1,318	1,507	.....	189
		110,309	11,421	9,896	1,525	.....
29 30 31 32 33 34	City of St. Louis 687,029		687,029	54,636	79,375,.....	24,739
Totals		3,293,335	3,293,335	319,909	323,074	.....
					319,909	.....
Republican majority					3,165	

“Respondents further respectfully represent and show that under the apportionment of the State for Senators in 1901, Jackson county was divided into two districts, numbered 5 and 7, and the city of St. Louis was divided into six districts, numbered 29-34, inclusive, and that, according to the official returns of the votes cast therein for the office of State senator at the general elections held in November, 1908, and 1910, the Fifth, Seventh, Thirty-first and Thirty-third districts elected the Democratic candidates, and the Twenty-ninth, Thirtieth, Thirty-second and Thirty-fourth districts elected the Republican candidates for the office of State senator;

“That the numbers and shapes of the districts described in the statement filed April 18, 1911, together

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with the counties composing them, are correctly set forth on the following map of the State of Missouri:



Map of the State Senatorial Districts of Missouri Under the Apportionment of April 18, 1911.

“Respondents further respectfully represent and show that the first and only official knowledge or information which respondents had of the said statement of the senatorial districts was on or about November 1, 1911, when the Secretary of State presented to the clerk of the circuit court, city of St. Louis, a copy of said statement, and when respondents received from the Secretary of State a letter inclosing a copy of said statement, and stating that the same had been formally filed with the said clerk, that respondents, as a court, might take such action thereon as the Constitution and laws of this State require; that on November 10, 1911, respondents in general term assembled, made an order to the effect that at ten o’clock in the

morning of Friday, December 1, 1911, a meeting of the general term of the circuit court, city of St. Louis, would be held in Division No. 4, of said court, at the courthouse in the city of St. Louis for the purpose of then and there hearing the views and arguments of all persons desiring to be heard on the question of whether or not the said statement complied with the provisions of the Constitution of the State so as to require any action by respondents, a copy of which order was sent to the Governor, the Secretary of State and the Attorney-General; that on December 1, 1911, respondents as such judges of the circuit court, city of St. Louis, met in general term, in accordance with the said order, and duly heard the views and arguments of the relator and all other persons desiring to be heard, and after duly considering the same, on December 9, 1911, made an order to the effect that the circuit court, city of St. Louis, did not consider the attempted apportionment of the State for State senators contained in the statement of the districts made by the Secretary of State and Attorney-General of the State, and filed in the office of the Secretary of State on April 18, 1911, to be in conformity with the Constitution of the State, and did then refuse to subdivide the city of St. Louis into suitable districts thereunder.

“That the provisions of article 4 of the State Constitution require that the population of the State, which, according to said census is 3,293,335, should be divided by thirty-four, which is the number of senatorial districts, giving a quotient of 96,862, which is the ratio of equality of representation in the State senate, and each county of the State having a population in excess of said senatorial ratio is entitled to as many senators as the number of times which the said ratio is contained in its population, and that the apportionment contained in the said statement does not comply with the requirements of article 4 of the State Constitution, in that the city of St. Louis, having a

population of 687,029, containing the senatorial ratio seven times, with a remainder of 8995, is entitled by right under the Constitution to seven senators, and is apportioned but six senators in said statement of the districts.

“That the apportionment contained in the said statement does not comply with the requirements of article 4 of the State Constitution, in that, the difference between the population of the largest district (21) and the smallest district (4) is 52,534; in that, twenty out of thirty-four of the districts vary from the senatorial ratio over 10,000 in population, the First and Fourth varying over 25,000, the Eighth varying between 20,000 and 25,000, the Eleventh, Thirteenth, Twenty-first, Twenty-sixth, Twenty-seventh and Twenty-ninth to Thirty-fourth, inclusive, varying between 15,000 and 20,000, and the Sixth, Tenth, Twelfth, Twenty-third, Twenty-fourth and Twenty-eighth varying between 10,000, and 15,000; in that, the seventeen largest districts contain 412,229 more people than the seventeen smallest districts; in that, a large proportion of the districts are not compact in shape; in that, the districts which are least compact vary the most in population, and the districts which are the most compact vary the least in population; in that, all of the districts in Jackson county are odd numbered; in that, the said apportionment fails in many respects to comply with the requirements of the Constitution; in that, under the provisions of article 4 of the State Constitution there was vested in the Governor, Secretary of State and Attorney-General discretion to make the districts as nearly equal in population and as compact as may be, and there was imposed upon them the duty not only to observe such limitations and requirements, but also to exercise such discretion in a fair and reasonable manner without regard to party advantage, and having only in mind the purpose of securing compactness in the shape and equality in the

population of the several districts, whereas the Secretary of State and the Attorney-General in disregard of their duty, and in disregard of the provisions and limitations of the Constitution, in forming the districts, as shown by the facts aforesaid, wholly, grossly, arbitrarily, capriciously and for partisan purposes, ignored and did not consider or apply at all the said requirements of the Constitution, and did not fairly, properly and reasonably exercise the powers and duties imposed upon them.

“Wherefore, respondents respectfully represent that the apportionment contained in the statement of the senatorial districts filed in the office of the Secretary of State on April 18, 1911, has not become binding or effectual, is unconstitutional and void, and imposes no duty upon respondents as judges of the circuit court, city of St. Louis, to subdivide the city into suitable senatorial districts thereunder.

“Wherefore, having made a full and complete return, respondents pray to be hence dismissed with their costs.”

The motion for judgment is predicated upon the general allegation that the return of respondents does not state facts sufficient to constitute a defense to the alternative writ.

OPINION.

Briefly stated the facts of this case are as follows:

On September 30, 1910, the thirteenth decennial census of the United States was promulgated, which showed that the State of Missouri, on that date, had a population of 3,293,335; that the city of St. Louis had 687,029, and that Jackson county had 283,522.

That the Forty-sixth General Assembly was duly held in the City of Jefferson in the year 1911, but it failed to apportion or redistrict the State into senatorial districts as provided for by section 7 of article 4 of the Constitution.

That under the terms of said section it then became the duty of the Governor, Secretary of State and the Attorney-General to redistrict it, as therein provided; and on April 18, 1911, they regularly convened in the City of Jefferson for that purpose and took up the matter of redistricting the State into senatorial districts.

This body, composed of the Governor, Secretary of State and the Attorney-General, whose duty it was to apportion the State into Senatorial districts, will hereafter be styled the "Miniature Legislature," for two reasons: first, for the sake of brevity; and, second, because they in fact constitute a legislative body for the purposes there mentioned.

That the districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority, cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States Government. That authority is akin to, and flows from the same power and authority that fixes the boundary line of the State, and subdivides the State into counties, etc.

Not only that, but the very same section of the Constitution which authorizes and empowers the Legislature proper to apportion and redistrict the State into senatorial districts, also provides for and empowers this body of three State officials to redistrict it in case the General Assembly neglects or fails to do so.

That being true, and both deriving their authority from the same source, and performing precisely the same duties, it must stand to reason, that if the labors of the General Assembly are legislative, then the work of this body must also be legislative in character.

We call the one an act of the General Assembly, the other the statement of the Miniature Legislature.

These views also find support in the cases of State ex rel. v. Patterson, 229 Mo. 373, l. c. 382, 383, 386, 387, 388, 391 to 396; and State ex rel. v. Roach, 230 Mo. 408, l. c. 428, 431, 433, 434, 435, 438, 439.

In the former case, in speaking of the power of the county and circuit courts to divide their counties into representative and senatorial districts, GRAVES, J., on page 288, used this language: "Neither court can act until the Legislature acts by way of an apportionment bill. Of course, as to the senatorial districts, if the Legislature fails to apportion, the apportionment may be made by other officers mentioned in section 7 of article 4 of the Constitution, which action upon their part stands in lieu of legislative action and would authorize the circuit court in particular counties to subdivide the counties into senatorial districts. But in either event, the circuit court must act at a time when it appears that the county is entitled to more than one senator."

And in State ex rel. v. Roach, *supra*, in speaking of section 7 of article 4 of the State Constitution, FOX, J., on page 428, says: "It is now the settled law of this State that the senatorial districts have been divided and their boundaries specifically defined in accordance with the provisions of the Constitution last above cited, and the people of this State fully recognized the validity of such law, and in the election of their senators conformed to its provisions."

The Governor being unable to agree to the plans of apportionment as proposed and agreed to by the Secretary of State and the Attorney-General, though being present, refused to vote for or against those plans, or otherwise participate therein, for the reasons stated in the return. Thereupon the Secretary of State and the Attorney-General agreed to the apportionment set forth in the alternative writ of mandamus. They

then filed in the office of the Secretary of State a full statement of the apportionment so made by them, duly authenticated; but the Governor refused to sign said statement, or to promulgate it as is provided for by said section 7 of the Constitution, for the reason that the apportionment or redistricting was arbitrarily and unequally done, and otherwise in violation of the Constitution of the State.

The propositions thus presented involve the construction of certain portions of sections 5, 6, 7, 9, 10 and 11 of article 4 of the Constitution, relating to the apportionment of State senators.

The material parts thereof are as follows:

"Sec. 5. The Senate shall consist of thirty-four members, to be chosen by the qualified voters of their respective districts for four years. For the election of senators the State shall be divided into convenient districts, as nearly equal in population as may be, the same to be ascertained by the last decennial census taken by the United States.

"Sec. 6. When any county shall be entitled to more than one senator, the circuit court shall cause such county to be subdivided into districts of compact and contiguous territory, and of population as nearly equal as may be, corresponding in number with the senators to which such county may be entitled; and in each of these one senator, who shall be a resident of such district, shall be elected by the qualified voters thereof.

"Sec. 7. Senators and representatives shall be chosen according to the rule of apportionment established in this Constitution, until the next decennial census by the United States shall have been taken, and the result thereof as to this State ascertained, when the apportionment shall be revised and adjusted on the basis of that census, and every ten years thereafter upon the basis of the United States census; or if such census be not taken, or is delayed, then on the basis

of a State census; such apportionment to be made at the first session of the General Assembly after each such census; Provided, that if at any time, or from any cause, the General Assembly shall fail or refuse to district the State for senators, as required in this section, it shall be the duty of the Governor, Secretary of State and Attorney-General, within thirty days after the adjournment of the General Assembly on which such duty devolved, to perform said duty, and to file in the office of the Secretary of State a full statement of the districts formed by them, including the names of the counties embraced in each district, and the numbers thereof; said statement to be signed by them, and attested by the Great Seal of the State, and upon the proclamation of the Governor, the same shall be as binding and effectual as if done by the General Assembly.

"Sec. 9. Senatorial and representative districts may be altered from time to time, as public convenience may require. When any senatorial district shall be composed of two or more counties, they shall be contiguous; such districts to be as compact as may be, and in the formation of the same no county shall be divided.

"Sec. 10. The first election of senators and representatives, under this Constitution, shall be held at the general election in the year one thousand eight hundred and seventy-six, when the whole number of representatives, and the senators from the districts having odd numbers, who shall compose the first class, shall be chosen; and in one thousand eight hundred and seventy-eight the senators from the districts having even numbers, who shall compose the second class, and so on at each succeeding general election, half the senators provided for by this Constitution shall be chosen.

"Sec. 11. Until the State shall be divided into senatorial districts, in accordance with the provisions

of this article, said districts shall be constituted and numbered as follows:" etc.

Counsel for relator contends that when the Miniature Legislature apportioned or redistricted the State into senatorial districts in pursuance to the mandate of the constitutional provisions previously mentioned, and filed in the office of the Secretary of State a duly authenticated statement thereof, said statement became as effective as if it had been done by the Legislature itself, and that the statement so filed became an act of legislation, or statutory in character; that under said section 6 of the Constitution it is just as much the duty of the judges of the circuit court of the city of St. Louis to subdivide the city into six senatorial districts, as if the redistricting of the State had originally been made by an act of the General Assembly instead of by the statement of the Miniature Legislature; and that for all intents and purposes the statement of the latter was and is just as binding as would have been the act of the former; and that mandamus is the proper procedure to compel said judges to perform that duty.

The following among other authorities are cited and relied upon to support this contention: State ex rel. v. Higgins, 125 Mo. 364, l. c. 366-8; State ex rel. v. Patterson, 229 Mo. 364-369; State ex rel. v. Patterson, 229 Mo. 373; People ex rel. Baird v. Supervisors, 138 N. Y. 95, 115; State ex rel. v. Smith, 105 Mo. 6, 9; State ex rel. v. Field, 107 Mo. 445; State ex rel. v. Jones, 155 Mo. 576; State ex rel. v. Smith, 172 Mo. 446, 459; State ex rel. v. Broadbush, 207 Mo. 107, 121-2; State ex rel. v. Turner, 210 Mo. 77; State ex rel. v. Neville, 157 Mo. 386; State ex rel. v. McCammon, 111 Mo. App. 626; and many others.

Counsel for respondents, generally speaking, do not controvert the correctness of the legal propositions stated in the contention of counsel for the opposition, but concede the law to be, as an abstract legal proposition, as it is there stated by counsel for

relator, and cite the following additional authorities in support thereof: State ex rel. v. Roach, 230 Mo. 408, l. c. 428, 431, 433, 434, 435, 438, 439; State ex rel. v. Ziegenhein, 144 Mo. 283, l. c. 286-7; State ex rel. v. Warner, 197 Mo. 650, l. c. 655-7 and 669; State ex rel. v. Gordon, 238 Mo. 168; State ex rel. v. Messerly, 198 Mo. 351, l. c. 355-6; State ex rel. v. Nast, 209 Mo. 708, l. c. 716-8; People, ex rel. v. Rice, 135 N. Y. 473; People ex rel. v. Supervisors, 147 N. Y. 1, l. c. 3, 8.

However, they further insist that the rule there announced has no application to the facts of this case, for two reasons: first, because the statement of the apportionment of the State, made by the Miniature Legislature, was never signed by, or promulgated by the Governor, as required by said section 7 of the Constitution; and, second, because even though it be conceded that it was signed and promulgated as required by law, nevertheless relator insists that, said statement possessing the character of a statute and performing the functions of such, its validity, which is denied, may be challenged in the courts of the State, for violating the Constitution.

As to the first: Section 7 of article 4 of the Constitution, in plain and unambiguous terms provides that if the General Assembly shall fail for any cause to redistrict the State into senatorial districts, as therein provided, it shall then become the duty of the Governor, Secretary of State and Attorney-General "to perform said duty, and to file in the office of the Secretary of State, a full statement of the districts formed by them, including the names of the counties embraced in each district and the numbers thereof; (a) said statement to be *signed by them*, (b) and *attested by the Great Seal* of the State, (c) and upon the *proclamation of the Governor*, the same shall be as binding and effective as if done by the General Assembly."

I have by the letters a, b, and c, called special attention to the three things which the Constitution re-

quires to be done after the apportionment has been agreed upon and reduced to writing, before the statement shall become effective; and have italicized the words thereof which in my opinion bear most vitally upon those three requirements.

By reading them, it will be seen that after the redistricting has been made by the Miniature Legislature, three things shall be done before the act or statement of the apportionment is to be "effective," namely: first, the members thereof must sign the statement; second, it must be filed and authenticated, by attaching thereto the Great Seal of the State; and, third, proclamation thereof must be by the Governor.

Conceding, which I think is correct, that a majority of the Miniature Legislature, when legally assembled for the purpose of redistricting the State, as provided for by said section of the Constituion, constitutes a quorum to transact business, then we must necessarily hold that the statement was properly and legally signed when the Secretary of State and the Attorney-General attached their signatures thereto. As to the authentication and filing of the statement, there is no question raised—all concede that the Great Seal of the State was properly affixed thereto, and that it was properly filed in the office of the Secretary of State. This leaves only one, the third requirement mentioned, to be performed, before the statement shall become as effectual as an act of the Legislature.

This is the real bone of contention involved in this branch of the case.

Practically all of the counsel for both sides concede that the statement must be promulgated before it becomes effective, but they differ widely as to what constitutes a promulgation within the meaning of the Constitution. They also contend with much force that proclamation has been made.

Others suggest that this section of the Constitution is directory only and not mandatory, and for that

reason the proclamation of the Governor is not necessary to make the statement of the apportionment binding and effectual.

We will consider the latter suggestion first.

This court is quite firmly wedded to the doctrine that constitutional requirements must be considered as mandatory rather than directory. [State v. Campbell, 210 Mo. 202; State v. Skillman, 209 Mo. 408; State v. Ulrich, 96 Mo. App. 689.] Those cases went to the extreme of holding that, section 38 of article 6 of the Constitution, the requirement that all indictments shall conclude with the words "against the peace and dignity of the State," was mandatory, and that the omission from the indictment of the word "the" before the word "State" was fatal and that the indictment was bad on that account. It must be conceded that those cases go to the very limit in holding constitutional requirements to be mandatory. In fact, they have been most severely criticised for that reason by the courts of our sister states, and by the public press of the country; nevertheless, there is much sound reason which might be advanced in their support, if we had the time or the inclination to discuss the matter here. In passing, however, I might state that the fundamental underlying such rulings is to prevent courts from tearing down by piecemeal those great bulwarks of liberty and shields of individual security, which they would not dare do openly and at one stroke.

Nor is that idea a novel one in this court. Mr. Justice COOLEY, who, it is conceded by the bench and bar of the entire country, was the peer, if not the superior of any constitutional lawyer who ever graced the bench or lent honor and dignity to the bar, in his matchless work on Constitutional Limitations, pp. 93 to 98, in discussing the question, whether rules which distinguish directory and mandatory statutes apply to the provisions of a written constitution, after a careful review of the authorities, said: "It will be found,

upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative." And the same eminent author, on page 72, speaking of the statutory rule which requires that full force and effect must be given to every clause and word of a statute, and that no word shall be treated as meaningless if a construction can be legitimately found which will preserve it and make it effectual, said: "This rule is applicable with special force to written constitutions, on which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication." Many decisions are cited in support thereof. See, also, *State ex rel. v. Cunningham*, 81 Wis. 440, l. c. 514, 515.

The same reason which would support argument in favor of omitting the word "the" from the indictment would equally support an argument justifying the omission therefrom of the entire clause, "against the peace and dignity of the State," the difference being one of degree and not one of principle. And I might further add, with considerable truth, that if one one-hundredth part of the time in the future should be devoted by prosecutors to seeing that indictments conform to such constitutional requirements, as has been devoted to the wholesale criticism of those cases, this generation, at least, would never again experience the necessity for this wild denunciation of the "technicalities of the law."

Before leaving this question, let me state to my law-loving neighbors, that after spending the best part of my life upon the bench, and after having observed and read quite extensively regarding the forms and modes of administering justice, the courts have done far more harm and injustice by judicial legislation, that is, by interpolating into statutes and constitutions

words and phrases which the lawmakers never placed therein, and by striking therefrom words and phrases which were placed there by the lawmakers, than they have by clinging to the so-called technicalities.

I no more believe than you do in technicalities, but where you have so jealously guarded them, as not to even intrust them to the care and keeping of your own Legislature, which you may change every two years, but have deposited them in strong constitutional receptacles constructed by your own hands, then by what fair process of reasoning can you condemn the court, another creation of yours, for not destroying the receptacle in which you deposited your valuables? Especially when you have solemnly declared in your Constitution, that the lawmaking power of the State shall rest and abide in the Legislature and the people themselves, untrammelled, uninfluenced and uncontrolled by the courts?

Therefore, whenever you wish your so-called technicalities of the law changed or wiped from the statutes of the State, or the Constitution thereof, do you not think that it would be more wise and less harmful to you and the people generally, for you and the Legislature, which you have created for that purpose, to amend the laws and thereby correct the technicalities of which you so bitterly complain, as well as all other evils of like character, and not condemn the courts for respecting the laws which you have solemnly enacted, and which the courts have taken a solemn oath to uphold and enforce? But enough of this.

Returning to the question we had in hand before this digression. According to the rule of construction previously stated, it can scarcely be seriously contended that the clause of the Constitution which provides that upon the proclamation of the Governor the statement shall be effective, is only directory. The rule stated excludes any such idea, and it conforms to

the general idea that all forms of legislation are supposed to meet with the executive approval.

Moreover, in construing a constitutional provision, in order to arrive at its true meaning, the words thereof should be given their usual and ordinary meaning, that is, the meaning which is attached to them when used to express ideas regarding the ordinary affairs of life.

Now what is the language of the constitutional provision now under consideration? We quote: . . . "and upon the proclamation of the Governor, the same [the statement] shall be as binding and effectual as if done by the General Assembly."

This language shows a clear intention on the part of the framers of the Constitution that the taking effect of the statement was to be conditioned upon the proclamation of the Governor.

According to Webster's and the Century Dictionaries, the word "upon" is synonymous with the word "on" in all its meanings; the word "up" being almost eliminated in the definitions. Looking to the definition of the word "on" Mr. Webster defines it as follows:

"6. Upon the occasion of; following upon; used with a noun of action to express the time, often also the occasion or cause, of what is further stated."

In the Century Dictionary we find the following:

"1. As used of place or position with regard to the upper and external part of something.

"g. Noting the ground, basis, motive, method, reason or reliance of or for some action.

"3. As used of relative position:

"e. After and in consequence of; from, as a cause.

"f. At the time of; expressing occurrence of time."

In Murray's New English Dictionary we find the following:

"7. Followed by a noun of action, etc., expressing the occasion of what is stated. When."

If we use the word "upon" as we find it in the Constitution, and in the sense which these lexicographers define it, which is supposed to be the usual and ordinary meaning thereof, and since the word "upon," as thus defined, is followed by the word proclamation, a noun of action, the clear meaning of the constitutional provision, it seems to me, is, that the statement of the apportionment of the State into senatorial districts shall become binding and effectual upon the occasion of, following upon, because of, by reason of after and in consequence of the proclamation of the Governor, or at the time of the proclamation, or when proclaimed by the Governor. Or, if we transpose the language just used, the constitutional provision, as above construed, would mean that the statement of the apportionment of the State into senatorial districts shall not become binding and effectual until proclamation thereof is made by the Governor of the State.

This construction is also in harmony with the two rules of construction previously mentioned, namely: that the language of the Constitution should be so construed as to be mandatory, if it is susceptible of such a construction, and that each and every word and clause thereof should be given full force and effect, if it is possible to do so by any reasonable construction.

Looking now to the other branch of this same question, namely: (a) What is the meaning of the word proclamation, as used in this section of the Constitution? (b) Has that proclamation been made?

If I correctly understand the position of counsel for relator, it is this: That since the statement of the apportionment was duly signed by a majority of the members of the Miniature Legislature, properly authenticated by the Great Seal of the State, and found on file in the office of the Secretary of State, there arises therefrom an indisputable presumption of law,

to the effect that proclamation thereof was properly made, and that said presumption is binding upon this court. In support of that position we are cited to the cases of *Lepeyra v. United States*, 17 Wall. 195 (U. S.) and *Wolsey v. Chapman*, 101 U. S. 770.

This calls for a somewhat critical examination of the language of the Constitution bearing upon that point.

The word proclamation, as used in this constitutional provision, must also be given its usual and ordinary meaning.

Mr. Webster defines the words as follows:

"1. Act of proclamation: official or general notice; publication.

"2. That which is proclaimed, publicly announced. . . .

"Law: A public notice by an official of some order, an intended action, or some state of facts. In British and American law the term is used only of such notices by an administrative or executive officer, or the King of Great Britain, the President of the United States, a Governor, mayor, etc., esp. with reference to some matter of public policy or the exercise of some administrative or executive power affecting the public at large; as a proclamation of material law; a Thanksgiving proclamation."

When we analyze this definition, we find that it is composed of two elements, namely: first, the officer whose duty it is to make the proclamation, and, second, the matter to be proclaimed by him.

Now as to the first: Who is the officer designated by the Constitution to make the proclamation? That question is answered in plain terms by the Constitution itself. It says "upon the proclamation of the Governor," etc. That language means the Chief Executive of the State; not the Governor, the Secretary of State and the Attorney-General, nor the two latter by themselves. There is nothing in the language used, which

by any fair or reasonable construction can be said to include or refer to the Secretary of State or Attorney-General, severally or collectively; but if we read the language just quoted in connection with its context, it will clearly appear that it was the intention of the framers of the Constitution to exclude the Secretary of State and the Attorney-General from participating in the proclamation. The language of the contract is that all three of said officers shall apportion the State into districts, make out and sign the statement thereof, and fire it in the office of the Secretary of State, but when it comes to speak of the proclamation, it drops therefrom the words "Secretary of State" and the "Attorney-General," and all nouns and pronouns and all other words which refer to them in any manner, but says in plain and unambiguous language that the proclamation shall be made by the Governor.

Notwithstanding these plain constitutional provisions, and notwithstanding the fact that the record shows that the Governor, from start to finish, refused to participate in the apportionment, to make up or sign the statement of the redistricting, to authenticate or assist in the filing of the statement in the office of the Secretary of State, and persistently refused and still refuses to make proclamation thereof, nevertheless, counsel for relators insist that there is a presumption of law which conclusively presumes that the Governor did make the proclamation required by said section of the Constitution.

We have carefully examined the cases cited by counsel, which it is insisted support that contention, and find that they have no application whatever to the facts of this case. The rule there announced only applies where the proclamation provided for has in fact been signed, sealed, delivered and filed in the office of the proper custodian thereof by the officer whose duty it was to make the proclamation; and in those particular cases, innocent parties had acted with the

understanding that proclamation had been made, which fact seems to have had considerable influence in aiding the court to reach the conclusions there stated. Clearly there is nothing in common between those cases and the one at bar. There the officer did every thing the act required him to do, except to make public outcry of his approval; while here the Governor concurred in nothing the other members did, but vigorously dissented from their every act, and has constantly refused to make proclamation of the statement mentioned.

We are, therefore, clearly of the opinion, that this clause of said section of the Constitution is mandatory, and that the statement of the Miniature Legislature, dividing the State into senatorial districts, is not now operative and effective, and will not become so until the Governor of the State signifies his approval thereof, by making proclamation thereof, as provided for by said constitutional provision.

II. This brings us to the consideration of the second branch of the case, as outlined in the beginning, namely: Conceding only for the sake of the argument, that the statement of the Miniature Legislature apportioning the State into senatorial districts was properly enacted and duly proclaimed, nevertheless, does it violate the constitutional provisions previously mentioned, as is insisted upon by counsel for respondents?

The great importance and the gravity of the question demands that it should be approached with due caution and considered with the highest degree of care.

By carefully reading sections 5, 6, 7, 9, 10 and 11 of article 4 of the Constitution of 1875, the material parts of which have hereinbefore been copied, it will be seen that they place certain well known restrictions and limitations upon the power and authority of both the General Assembly and the Miniature Legislature in apportioning or dividing the State into senatorial districts. Those limitations may be divided into two classes: first, those which leave to neither of said legi-

lative bodies any discretion whatever in the performance of their duties, or in the formation of the districts aforesaid; and, second, those which leave to both of said bodies a discretion in the performance of certain other duties named.

(Hereafter, whatever is said about the Legislature or the acts thereof, will refer to the Miniature Legislature, for the reason that neither the Legislature proper, nor any of its acts, are before us for review.)

The first class of duties before mentioned, namely, those which must be performed by the Legislature without the exercise of any discretion upon its part, may be subdivided into three other classes, viz.:

(a) That the Legislature shall divide the State into thirty-four senatorial districts.

(b) That when a district is to be composed of two or more counties they must be contiguous. And

(c) That in forming a district to be composed of more than one county, no county shall be divided, that is, one part of a county shall not be placed in one district and the remainder placed in another.

And the second class of duties before mentioned, namely, those which must be performed by the Legislature, but in the performance of which it may exercise a limited degree of discretion, may be divided into:

(a) It shall make each district as nearly equal in population as is practical, or as may be done.

(b) That when a district is to be composed of more than two counties, it shall be as compact as it can reasonably be made so.

Preliminary to the discussion of the particular questions presented for determination, it will not be out of place to state generally that the authorities uniformly hold that the courts have jurisdiction to entertain an action, pass upon the validity of acts apportioning the State into senatorial districts and to declare them invalid for infringement upon the Constitution, or for the failure of the apportioning body to observe

the non-discretionary limitations placed by the Constitution upon their authority, in the formation of the districts. The following cases so hold: *People ex rel. v. Thompson*, 155 Ill. 451; *People ex rel. v. Carlock*, 198 Ill. 150; *People ex rel. v. Rice*, 135 N. Y. 473, 16 L. R. A. 836; *Sherrill v. O'Brien*, 188 N. Y. 185; *People ex rel. v. Supervisors*, 138 N. Y. 95, 20 L. R. A. 81; *State ex rel. v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; *State ex rel. v. Cunningham*, 83 Wis. 90, 17 L. R. A. 145; *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 402; *Supervisors v. Blacker*, 92 Mich. 638, 16 L. R. A. 432; *Parker v. State ex rel.*, 133 Ind. 178, 18 L. R. A. 567; *Denny v. State ex rel.*, 144 Ind. 503, 31 L. R. A. 726; *Brooks v. State ex rel.*, 162 Ind. 568; *State ex rel. Morris v. Wrightson*, 56 N. J. L. 126, 22 L. R. A. 548; *Harmison v. Commissioners*, 45 W. Va. 179, 42 L. R. A. 591.

There is, however, some slight conflict of authority as to what extent the courts may go in reviewing the failure of the apportioning body to observe the discretionary limitations placed upon its authority to act in the premises. However, this branch of the case will receive careful consideration later, as it constitutes the principal controversy before the court.

As regards the first class of limitations mentioned, it is sufficient to state that there is no special controversy as to it, it being practically conceded by counsel that the limitations therein stated were observed and substantially complied with by the Legislature in the formation of the districts, and it will therefore be put aside. However, the limitations mentioned in the first class are so closely interwoven and intimately connected with those stated in the second, that what may be said regarding the one will necessarily apply more or less to the other.

This brings us to the consideration of the second class of duties previously mentioned, or those powers devolved by the Constitution upon the Legislature,

with a limited discretion. I use the words "limited discretion," for the reason that the Constitution in express terms limits the discretion, by providing that the Legislature shall apportion the State into districts, but in doing so it shall make each district as *nearly equal in population as may be*, and that when a district is to be composed of more than two counties, they shall be as *compact as may be convenient*.

The words italicized show conclusively that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best. Had the framers of the Constitution intended that the Legislature should apportion the State into districts according to its own free and untrammelled will, then they would not have used the words of restriction before mentioned. This is too plain for argument. Therefore, having seen that the authority and discretion of the Legislature is thus limited, it would be error to treat the proposition upon the theory that the Legislature had unlimited discretion in the matter; and for that reason many of the authorities cited and relied upon have no application to this case; they dealing with officers whose discretion was unrestricted.

We will now examine the act or statement of the Legislature apportioning the State into senatorial districts, and determine therefrom whether or not that act violates the Constitution in either of the particulars stated in the second class of duties and limitations before mentioned.

We will consider them in the order there stated.

(a) Does this act, as required by the Constitution, give each of the senatorial districts a population as near equal as may be? I think not; and my reasons for so stating are these:

The United States decennial census for the year 1910 shows that the population of the State was, at the time in question, 3,293,335, and there being thirty-four senatorial districts in the State, each would have a population of 96,862, if apportioned equally among them. That was not done by the act in question, nor does the law require that the population of the State shall be apportioned equally among the various districts; but it does say that it should be so done as near as may be.

The census also shows that the population of the city of St. Louis was 687,029, and if we divide that number by 96,862, the ratio each district would be entitled to, if the population of the State should be divided equally among the thirty-four districts, it would give that city seven senators and still leave a margin of 8995 persons unrepresented; nevertheless, the act allowed only six districts to said city, leaving 105,857 persons unrepresented.

Counsel for respondents insist that this part of the act of the apportionment is clearly violative of the Constitution, and is therefore null and void.

This is a most flagrant violation of the limited discretion granted by the Constitution to the Legislature; and if the law will permit, we will have to hold it to be null and void. We will consider the legal question later.

Again, the census gives Jackson county a population of 283,522, and if we divide that number by 96,862, the ratio before mentioned, it would give to that county two senators with a surplus population of 89,798. Counsel for respondents insist that this provision of the apportionment act is also unconstitutional, null and void for the reason that it gives to Jackson county three districts, when in fact, according to the senatorial ratio, it is only entitled to two.

Literally speaking that is true; but counsel overlook that provision of the Constitution which prohibits the Legislature, when forming a district to be com-

posed of more than one county, from dividing a county, and placing a part of it in one district and the remainder in another. And under that rule, if the act had given Jackson county only two districts, then there would have been a surplus population of 89,798, unrepresented in that county (which could not have been placed in another district composed of other counties), which would have been almost as flagrant a violation of discretion as was exercised by the Legislature in the St. Louis apportionment before mentioned.

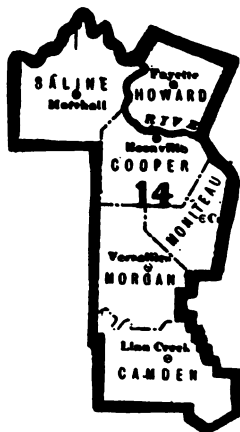
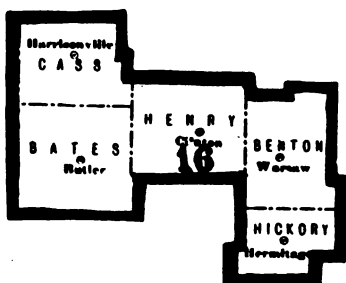
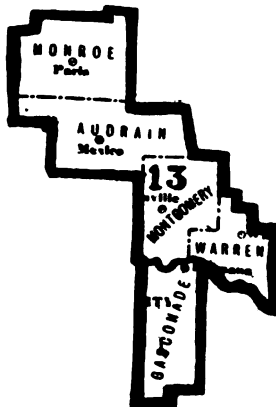
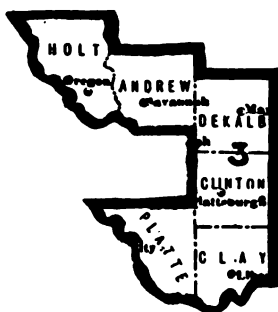
If we were right in holding that the act of apportioning the city of St. Louis into six districts, was void, then by parity of reasoning we must, under the facts and circumstances, hold that the act apportioning Jackson county into three districts was valid.

It is also shown by the census that the Twenty-first district has a population of 116,387, while the Fourth has a population of only 63,853, a difference of 52,534; that twenty out of thirty-four of the districts vary from the senatorial ratio over 10,000 in population, the First and Fourth varying over 25,000, the Eighth varying between 20,000 and 25,000, the Eleventh, Thirteenth, Twenty-first, Twenty-sixth, Twenty-seventh and Twenty-ninth to Thirty-fourth, inclusive, varying between 15,000 and 20,000, and the Sixth, Tenth, Twelfth, Twenty-third, Twenty-fourth and Twenty-eighth varying between 10,000 and 15,000; in that, the seventeen largest districts contain 412,229 more people than the seventeen smallest districts.

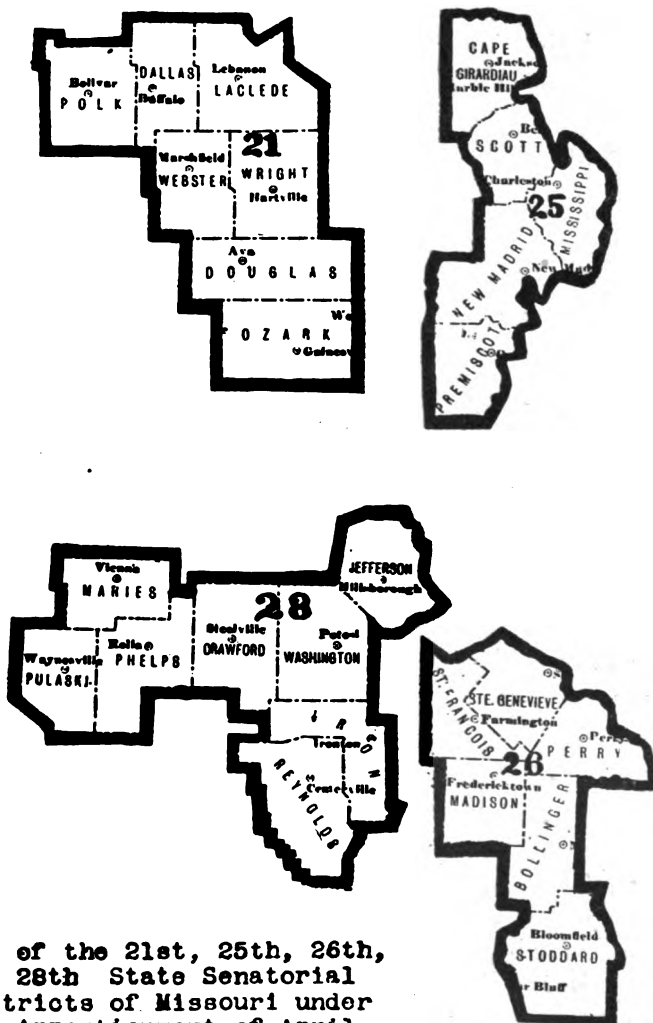
As an independent proposition, it cannot be fairly insisted that the act making this apportionment gives to each of these districts a population that is as near equal in numbers as it was possible to make it; and were it not for the fact that the Constitution also requires that the districts shall be made as compact and contiguous as it could reasonably be done, without a division of counties, I dare say, no one would for a moment attempt to justify such action.

But if that apportionment is to be justified upon the ground that the equality of population had to be sacrificed for the preservation of the county unit and the compactness of the territory forming the districts, then the apportionment must fall, for the reason that, in my opinion, the act more obviously violates that provision of the Constitution which requires the districts to be compact, than it does the one requiring equality of population.

In confirmation of this statement, I here set out maps of the Third, Thirteenth, Fourteenth, Sixteenth, Twenty-first, Twenty-fifth, Twenty-sixth and Twenty-eighth districts, which are as follows:



Map of the 3rd, 13th, 14th,
and 16th State Senatorial
Districts of Missouri under
the Apportionment of April,
18, 1911.



Map of the 21st, 25th, 26th,
and 28th State Senatorial
Districts of Missouri under
the Apportionment of April,
18, 1911.

Counsel for respondents also contend, "that the apportionment shows that considered together the limitations as to compactness of territory and equality in population have not been observed to such an extent as to constitute a gross abuse of discretion. A reasonable construction of the limitations as to compactness of territory and equality in population would seem to require that if predominance is to be given to either, it should be given to the latter because equality in representation has always been one of the ideals in American government. This predominance, however, must be slight because subject to the limitation that the districts must also be compact. It therefore follows that any departure from the limitation of equality in population must be made for the sake of securing greater compactness, and any departure from the limitation of compactness must be made for the purpose of securing greater equality in population, so that it is evidence of abuse of discretion for a district not compact in shape not to approach the senatorial ratio of population to a reasonable extent. In other words it is to be expected that compact districts shall show a greater variation from the senatorial ratio than districts which are not compact, so that if districts not compact show a less reasonable approximation to the senatorial ratio than those which are compact, there would be evidence of a gross abuse of discretion."

In regard to this construction, we will state that the following table will show the difference between the senatorial ratio, 96,862, and the population of the twelve most compact districts, and the eleven least compact; no district lying wholly in one county is included.

State ex rel. v. Hitchcock.

Table of Variations in Population.

(Ratio 96,862.)

COMPACT DISTRICTS.			NON-COMPACT DISTRICTS.		
No.	Pop.	Diff.	No.	Pop.	Diff.
1	67,264	-29,598	4	63,853	-33,009
27	112,247	15,385	8	76,759	20,103
24	81,892	-14,970	11	77,197	-19,665
10	84,359	-12,503	21	116,387	19,525
23	84,736	-12,126	13	77,565	-19,297
12	107,890	11,028	26	114,899	18,037
6	86,807	- 9,055	28	110,309	13,447
15	90,364	- 6,498	14	104,232	7,370
22	91,127	- 5,735	25	103,597	6,735
9	102,486	5,624	3	92,380	4,482
18	100,356	3,494	16	99,706	2,844
17	93,679	- 3,183			
12 Total variation 129,199			11 Total variation 164,514		
			Compact " 129,199		
			Difference 35,315		

This table, which is absolutely correct, shows that collectively the greatest variances in population are in the districts which are the least compact, or in other words, it shows that compactness was not sacrificed in order to obtain equality in population, nor *vice versa*.

This analysis of the facts of the case is most conclusive evidence that the Legislature in apportioning the State into districts wholly disregarded the constitutional mandates as to compactness of territory and equality in population.

We will now consider the law applicable to the facts of the case.

At a previous place, we had occasion to state that the authorities were uniform in holding that the courts have jurisdiction to pass upon the invalidity of acts of the Legislature apportioning a State into representative and senatorial districts for failure to obey the limitations which prohibit the exercise of all discretion on the part of the lawmakers; also that they were practically uniform in holding that the courts

have jurisdiction to pass upon the validity of apportionment acts, and to hold such acts unconstitutional and void, for failure on the part of the Legislature to properly observe the limitations which permit the exercise of limited discretion in that regard.

This slight conflict of authority, as to the extent to which the courts may go in reviewing the exercise of discretion within the meaning of the limitations stated in the second class of duties, before mentioned, is no more than should be expected. This is largely due to the fact that there are no absolute limits fixed by the Constitution within which the discretion must be exercised, and the courts are disinclined to interfere where they find any discretion has been exercised by the Legislature, even though the exercise of that discretion has exceeded the general bounds limiting its discretion. It is also due to the fact that the courts have been loath to inquire into the motives that prompt the Legislature in such matters, preferring naturally to leave the responsibilities of a co-ordinate branch of the government to the people who elected it. Confusion has also arisen from the fact that the courts have not always drawn the proper distinction between sovereign legislative bodies, created by the Constitution itself, and those *quasi*-legislative and judicial bodies created by statute, or appointment by some authorized officer of the State. And in this connection, we wish to state that those decisions of courts controlling the discretion of such minor bodies have no application to the facts of this case. Here the Constitution created the Miniature Legislature for the express purpose to apportion the State into senatorial districts, and for that purpose the Constitution gives to it the same power and authority that it gave to the Legislature proper, in that regard, and for that reason both of them must and do stand upon an equal footing before the law, and in the presence of the courts.

We will, therefore, put aside that great array of authorities cited by counsel for relator, which apply to those *quasi*-legislative and judicial bodies; and will only consider those authorities which deal with sovereign legislative bodies.

The latter may be divided into three classes: (a) those which hold that the courts will not declare an apportionment act invalid unless it plainly appears therefrom that the limitations placed upon the discretion of the Legislature have been wholly ignored, and not applied at all in creating the districts; (b) others of them hold that courts will interfere whenever the act shows that the discretion has been grossly abused; and (c) those which hold that the court will not interfere except where the act shows that the discretion has been abused to such an extent as to show the Legislature entirely disregarded the limitations enjoined upon it by the Constitution. But practically all of them unite in holding that it would be quite difficult to lay down a general rule applicable to all cases, but each case that arises must stand largely upon the facts thereof, and the character and extent of the limitations imposed upon the discretion of the Legislature by the Constitution.

In the case of *State ex rel. v. Cunningham*, 83 Wis. 90, the senatorial ratio was 51,117; the Legislature in apportioning the districts varied the population thereof from 30,700 to 65,900. In that case, the Supreme Court held that the act of apportionment was unconstitutional, null and void, for the reason that it showed upon its face that the Legislature plainly disregarded the constitutional limitations placed upon its discretion in establishing the districts.

In *Giddings v. Blacker*, 93 Mich. 1, the senatorial ratio was 65,000. The act of apportionment varied the population of the districts from 39,727, to 97,330, and eight senators represented 695,717 people, and eight others represented only 349,156, and the county

of Saginaw, with a population of 82,273, was given two senators. The Supreme Court held the act unconstitutional, because it showed upon its face that the Legislature wholly disregarded the constitutional limitations placed upon it. The court in that case took occasion to criticize in unmeasured terms the practice of gerrymandering, and said that it was time that a stop should be put to it. The language of the court upon that point is as follows:

“While it is true that the motive of an act need not be inquired into to test its constitutionality, I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common and has so long been indulged in without rebuke, that it threatens not only the peace of the people, but the permanency of our free institutions. The courts alone, in this respect, can save the rights of the people, and give to them a fair count and equality in representation. It has been demonstrated that the people themselves cannot right this wrong. They may change the political majority in the Legislature, as they have often done, but the new majority proceeds at once to make an apportionment in the interest of its party, as unequal and politically vicious as the one that it repeals. There is not an intelligent schoolboy but knows what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than a partisan advantage taken in defiance of the Constitution, and in utter disregard of the rights of the citizen.”

In *People ex rel. v. Rice*, 135 N. Y. 473, the act of apportionment gave to one county, with a smaller population, twice as many representatives as it gave to another of greater population; nevertheless, the court held the act valid. In discussing that case the

court in speaking through PECKHAM, J., on pages 498, 501 and 509-510, said:

“From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of numbers in representation has been the leading idea at all times in regard to republican institutions. Political divisions of the State have in New England been the bodies which were entitled to representation, and the town as a town and irrespective of the number of inhabitants has had its representative in the Legislature, so that a large town necessarily had no more representation than a much smaller one. This is the case to-day in some of the New England States.

“The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the Legislature, resides of course in the first instance with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial. In intrusting such power to any particular body, the people could by their Constitution give written instructions as to how it should be carried out, yet the essential nature of the power still remains. If a portion of it be intrusted to a body of men acting as a board for the mere purpose of making a mathematical calculation and with instructions to discharge its duties in a way which is solely mathematical, it is clear that the board has no discretion whatever and it is bound strictly by the terms of the grant of power. In such case the people have not in reality parted with the whole power. There may then be a power in the court to correct the very slightest

deviation from what can be clearly seen to be a mere ministerial duty. There being no possibility for the exercise of the slightest discretion, a violation of the arithmetical rule of proportion would become a violation of the Constitution and as such might be the subject of review by the courts. The power to review would exist because of the fact that the people had so bound and limited the exercise of the power to readjust the political divisions of the State that the power itself thus limited, had become in its exercise by the body to which it was intrusted, one of a ministerial nature only. Its nature as a political power in the board itself would in such case have been changed by the refusal of the people to permit of its exercise upon any other than a mathematical basis. Hence a direction to a body created by the people for such a purpose, which permitted no discretion in its exercise under any circumstances, might properly form the subject of enforcement by the courts. This, however, is not the case under our constitution. The power to alter these political divisions has been deposited by the people with the Legislature and under such circumstances as to compel the exercise of legislative discretion in carrying out the power granted. The political nature of the power is thus retained. The learned judge who delivered the opinion at special term in the Pond case himself admits that some discretion is vested in the Legislature and that in the nature of things it must be so left. He was of the opinion that the discretion thus vested in the Legislature had been overstepped and that the Constitution had been thereby violated, and that the courts could review and reverse this action of the Legislature."

Discretion is necessarily reposed in the Legislature because of the direction of the Constitution that in making up the senatorial districts they must at all times consist of contiguous territory, and that no county shall be divided in the formation of a district, ex

cept such county shall be equitably entitled to two or more senators. It is also provided that in apportioning members of Assembly every county shall be entitled to one member.

“This renders the mathematical process impossible both as regards senate districts and the apportionment of members of Assembly. We start then with the proposition that to the Legislature is entrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the Legislature might in its exercise possibly have come nearer to an equality, after complying with the special conditions mentioned in the Constitution? This would be to assert a power in the court to supervise the use of the discretion granted to the Legislature, if such discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion entrusted to the Legislature by the Constitution, unless it is plainly and grossly abused. The expression ‘as nearly as may be,’ when used in the Constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the Legislature in the way of a general statement of the principles upon which the apportionment shall be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the Legislature. We do not intimate that in no case could the action of the Legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been en-

tirely lost sight of and an intentional disregard of its commands both in the letter and the spirit had been indulged in.

“Upon the argument our attention was called to certain cases decided in Michigan and Wisconsin, involving to some extent the question decided therein.

“In some of them the violation of the spirit of the Constitution was gross beyond cavil or argument. They would come within the description of an abuse of legislative discretion. In others the positive commands of the Constitution as to counties were plainly violated. The actual decisions might perhaps be upheld on the lines laid down in this opinion, but there are some things stated in some of the opinions which go beyond what this court is prepared to concur in.

“The discretion necessarily vested in the Legislature must be finally disposed of by it, unless, as we have said, there is such an abuse of that discretion as to clearly show an open and intended violation of the letter and spirit of the Constitution.”

And in *Baird v. Supervisors*, 138 N. Y. 95, 112-114, the Board of Supervisors had made a division under which the districts varied in population from 31,000 to 102,000, and in holding the apportionment invalid, PECKHAM, J., says:

“Assuming that we have reached a correct conclusion as to the duty of the board to divide the county into assembly districts in the manner just stated, the true meaning of the section still remains somewhat of a problem. It is very plain that a division simply by an arithmetical process is not contemplated, because the injunction to refrain from dividing a town would in many cases render such a process wholly impracticable. The further injunction, to make the districts of convenient and contiguous territory, might render it still more impracticable to divide with relation merely to inhabitancy. The main duty which is imposed upon the board is to make the division equal as

to population, so far as that is attainable, while making each district of convenient and contiguous territory and keeping the town undivided. Perfect equality of population cannot, under these conditions, be attained. The proper discharge of the duty of division by the board implies considerable discretion in the formation of the various districts. The discretion exercised must be an honest and a fair discretion, arising out of the circumstances of the case, and reasonably affecting the exercise of the power of equal division. Before examining any division, it would be a *prima facie* presumption that the division actually made in any case was a proper one, and a full compliance with the duty imposed upon the board which made it. This would be in accordance with the presumption in favor of the due and proper discharge of official duty. Nor would the mere fact that the districts were to some extent unequal in population necessarily rebut this presumption. The necessity of considering the other facts provided for by the section, and already alluded to, might reasonably account for many, and even somewhat large, aberrations from the initial point of equal representation. While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is, on the other hand, sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate.

“We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn.

“A question of somewhat similar nature was before us in *People ex rel. v. Rice*, cited *supra*. The question there related to the amount of discretion reposed in the Legislature in the creation of senate dis-

tricts, and in the apportioning of members of the Assembly among the several counties. It was there stated that it was not intended to intimate by the decision then made that in no case could the action of the Legislature be reviewed by the courts, and that cases might easily be imagined where the action of the Legislature would be so gross a violation of the Constitution that it was plain that instrument had been entirely lost sight of, or intentional disregard of its commands, both in the letter and in the spirit, had been indulged in. If there were an abuse of the discretion so as to clearly show an open and intended violation of the Constitution, we held in that case that the courts might interfere. We did hold that the facts as presented contained no such features, and, although there was no mathematical division, the court refused to interfere with the discretion that had actually been exercised by the Legislature.

“We think, in the case of assembly districts, the duty is at least as plain which governs the board of supervisors as that which rests upon the Legislature in the case mentioned. It is not every departure from equality in the number of inhabitants that can be interfered with, or that ought to be the subject of review, by the courts.

“If the division with reference to the facts of convenience and contiguity of territory, the indivisibility of the town, and the number of inhabitants in the various districts, as compared with each other, do not lead most inevitably to the belief that the board has intentionally disregarded the constitutional provision, we think, in such case, its action should be upheld.

“We do not intend by this decision to hold that every trifling deviation from equality of population would justify or warrant an application to a court for redress. Such, we think, is not the meaning of the provision. It must be a grave, palpable and unreasonable deviation from the standard, so that, when the

facts are presented, argument would not be necessary to convince a fair man that very great and wholly unnecessary inequality had been intentionally provided for. This is as near an exact definition of the meaning of this section in this regard as I am able to now give."

In *People ex rel. v. Thompson*, 155 Ill. 451, 461-2, 462-4, 465, 469-70, 480-3, 484-5, with a senatorial ratio of 75,000, the districts varied in population from 62,000 to 88,000. In holding these discrepancies insufficient to invalidate the act, but in approving the rule announced in *Michigan* and *Wisconsin* cases, *supra*, the court said:

"It would be a legal anomaly if the Legislature could enact a statute in clear conflict with the express limitations fixed by the Constitution, in a matter of vital importance to all the people of the State, and the courts have no jurisdiction to pass upon the validity of such statute when directly involved in a pending case. It is not meant to be here said that the act or acts in question is or are in clear conflict with the limitations expressly fixed by the Constitution, but only that the courts have jurisdiction to determine whether it is so or not, and if such conflict be found to exist, to declare such act or acts void, and that this jurisdiction is not affected, when the question is properly raised in a suit at law, by the fact that only political rights of the parties are involved, nor by the contention that the statute in question is the mere product of the exercise of that political power residing in the Legislature, wherein its decision is final. It is undoubtedly true that, so far as the act in question is the expression of the unabridged discretion reposed in the Legislature, its decision must be final and not subject to review by the courts; but the courts have jurisdiction to interpret and construe the Constitution and the statute in order to determine whether the act is within the legislative discretion or not.

“That part of section 6 of article 4 of the Constitution which appellants insist has been violated by the Act of 1893, is as follows: ‘The General Assembly shall apportion the State every ten years, beginning with the year 1871, by dividing the population of the State, as ascertained by the Federal census, by the number fifty-one, and the quotient shall be the ratio of representation in the senate. The State shall be divided into fifty-one senatorial districts, each of which shall elect one senator, whose term of office shall be four years. . . . Senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and contain, as nearly as practicable, an equal number of inhabitants, but no district shall contain less than four-fifths of a senatorial ratio. Counties containing not less than the ratio and three-fourths may be divided into separate districts, and shall be entitled to two senators, and to one additional senator for each number of inhabitants equal to the ratio contained by such counties in excess of twice the number of said ratio.’ The section providing for minority representation in the house of representatives, adopted by the people in lieu of sections 7 and 8, which formed a part of the draft of the Constitution as submitted to the people, provides that three representatives shall be elected from each senatorial district. There is no difference, in our State, between the senatorial and representative districts, as in many of the States of the Union, but the territory of both is the same.

“It will be noticed that in the formation of senatorial districts, there are certain limits to the power of the General Assembly, prescribed by the Constitution in such definite terms as to be readily recognized and understood by every one, without room for difference of opinion. These limitations may be stated as follows:

“First. All districts, except those formed within

counties having sufficient population to be divided into separate districts, must be bounded by county lines.

“Second. A county cannot be divided into separate districts unless it contains at least one ratio and three-fourths; when it may be divided, and be entitled to two senators, and to one additional senator for every ratio in excess of two full ratios.

“Third. No district shall contain less than four-fifths of the ratio.

“Fourth. Districts shall be formed of contiguous territory.

“It would seem incontrovertible that as to these four restrictions, by which the power of the General Assembly is definitely limited, no room is left for difference of opinion, in reasonable minds, as to their meaning, nor for the exercise of any legislative discretion except within the bounds of these limitations, it being clear that they must all be observed in any sense which can be imputed to them, in the enactment of any valid apportionment statute.

“Nor is it claimed that in the Act of 1893, or in the Act of 1882, the Legislature disregarded any of them. But there are other requirements contained in the section of the Constitution above quoted, respecting the apportionment of the State, which, as qualified and made subject to the definitely expressed limitations above mentioned, are not so definite in meaning or easy of determination as to preclude differences of opinion in reasonable minds, or as to fall so clearly without the bonds of legislative discretion. These are: that districts must be formed of compact territory, and contain, as nearly as practicable, an equal number of inhabitants. And it is in respect to these provisions that the present controversy arises. The only definite rule which can be deduced from these two requirements of the Constitution, when controlled, as they must be, by those more definitely defined (and as to whether it should be applied or not in making

an apportionment all reasonable minds would agree, and the Legislature could have no discretion), may, we think, be stated as follows:

“Fifth. In making an apportionment of the State, under the Constitution, the Legislature must have in view, and apply, the principles of compactness of territory and approximate equality in population in the formation of senatorial districts.

“In applying these rules prescribed by the Constitution itself and by which the constitutionality of the statutes in question must be tested, it must be borne in mind that where there is any reasonable doubt as to whether a statute is constitutional or not, the courts will incline in favor of the law, and hold it valid.

“Keeping this rule of construction in mind, and having stated the rules prescribed by the Constitution which are limitations on the power of the General Assembly in making a senatorial apportionment, and which cannot be violated by that body in enacting any valid apportionment act, we will review, as briefly as we may, the questions involved, to ascertain whether or not the Legislature has overstepped these constitutional limits in passing the statute in question.

“The only county in the State having as many inhabitants as a ratio and three-quarters, at the time of the passage of either of the Acts of 1882 or 1893, was the county of Cook, and it was therefore the only county that was, or could be, divided. The intention is plainly manifest in the Constitution to preserve the integrity of the several counties in the formation of senatorial districts, except where a county has sufficient population to make it necessary to divide it into separate districts. The county being the most important political division of the State, its autonomy is expressly guarded by the Constitution in the formation of these legislative districts, and in importance it is placed above the requirements of compactness of ter-

ritory and equality in population. It might be a far less difficult matter to divide the State into fifty-one senatorial districts, formed of contiguous and compact territory and each having substantially the same number of inhabitants, if no regard were paid to county lines. But it cannot be doubted that such an apportionment would be plainly unconstitutional, notwithstanding it would secure a compactness of territory and equality in population in the several districts not otherwise attainable. As every district outside of Cook county must, under the Constitution, have been bounded by county lines, it is apparent that it was impossible to combine these counties, differing so radically in shape, size and population, so that there would be anything more than a reasonable approximation toward equality in population and perfect compactness of territory.

“The really difficult question in the case is to determine the bounds fixed by the Constitution to the discretion of the General Assembly, when that body, acting within other and more definitely expressed limitations, is complying with the constitutional mandate to form senatorial districts of compact territory, containing, as nearly as practicable, an equal number of inhabitants. If the statute is within those bounds, though resulting in inequality and injustice, it is valid, for the courts have no power to revise or annul an act of the Legislature which is the mere exercise of its discretionary power, or which rests in the legislative judgment.

“Many other instances might be cited, were it necessary, where the decision of the other departments of the State government are not subject to reversal by the courts. Full power and final authority to perform the different governmental functions must be lodged somewhere, and it is the duty of all public functionaries to respect the disposition of the several powers of government as made by the Constitution.

It would be a new doctrine and one fraught with much danger, to hold that the courts may reverse or annul acts of the other departments in matters committed by the Constitution to the judgment and determination of such other departments, or in matters where it is a question of serious doubt whether they are so committed or not, even though the courts might be satisfied that in the determination of the question by the department to which it is committed, the Constitution has not been properly observed. The only remedy for dereliction of duty in such cases lies in the frequency of elections, by which the people may choose others to serve them, and in the impeachment and removal from office of those made subject to that punishment. This view does not deny the jurisdiction of the court to pass upon the constitutionality of a statute making a senatorial apportionment to the same extent as in other cases, but it does deny the power of the court to follow the statute any further than the boundary line enclosing the discretionary power of the Legislature, and to invade that discretion in any case.

“It was not discretionary with the Legislature whether it would, or not, comply with the four restrictions before mentioned, upon its power, respecting the observance of county lines, the division of counties, the minimum number of inhabitants necessary to form a district, and the contiguity of territory in forming districts. Nor was it discretionary as to whether or not that body would, subject to said limitations, apply the principles of compactness of territory and approximate equality in population in making the apportionment; but we do hold that it was a question for its final determination as to what approximation could or should be made toward perfect compactness of territory and equality in population, . . . and this, too, though treating this requirement of the Constitution as mandatory on the Legislature. In other words, if it clearly appeared that in the forma-

tion of any district, the requirement of compactness of territory and equality in population had been wholly ignored, had not been considered or applied at all, to any extent, then the statute would be clearly unconstitutional. But if it has been considered and applied, though to a limited extent only, subject to the other more definitely expressed limitations, then the General Assembly has not transcended its power, although it may have very imperfectly performed its duty, and the act is valid.

“The word ‘compact’ has different meanings, as given by standard lexicographers, according to the subject in connection with which it is used. . . . Counsel for appellants contend that, so far as it can be applied to mere territorial surface, it means ‘dense’—‘pressed together’; and they say: the districts are to be so formed that the territory shall be ‘pressed together’—close—near to a common center; in no way so well expressed as by the word ‘compact.’ Not much fault can be found with this contention, but we are of the opinion that as used in the Constitution, and applicable to mere territorial surface, the word ‘compact’ means ‘closely united,’ and that the provision that districts shall be formed of contiguous and compact territory means that the counties or subdivisions of counties (when counties may be divided) when combined to form a district, must not only touch each other, but must be closely united territorially: The requirement of contiguousness was contained in the Constitution of 1848, and it was evidently the intention of the people, in adding the requirement of compactness in the Constitution of 1870, to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the ‘gerrymander,’ and to require the Legislature to form districts, not only of contiguous, but of compact or closely united, territory.

“The provision requiring compactness of territory, subject, as it must be, to other more definitely expressed rules, may also, in application, be modified by the requirement of equality in population. It was said by the Supreme Court of Wisconsin in a recent case (*State v. Cunningham*, 83 Wis. 151), that ‘compactness, being of less importance, may to some extent yield in aid of securing a nearer approach to equality of representation.’ While it is not necessary, if within our province, to determine which of these two requirements should yield to the other, yet it is plain that in application each must to some extent affect the other. Who, then, must finally determine whether or not a district is as compact as it could or should have been made? Surely not the courts, for this would take from the Legislature all discretion in the matter and vest it in the courts, where it does not belong; and no apportionment could stand unless the districts should prove as compact as the judges might think they ought to be, or as they could themselves make them. As the courts cannot make a senatorial apportionment directly, neither can they do so indirectly. There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the Legislature.

“Some room, it must, in reason, be admitted, is left by the Constitution for the exercise of the legislative judgment in determining how near an approximation to perfect compactness of territory and equality in population can be made, and it must also be admitted that the scope within which the judgment of the Legislature may be exercised without being subject to the supervision of the courts must be determined by the language of the Constitution, and the ap-

plication of sound legal principles, and not by the mere arbitrary opinion of judges. Would it not be mere arbitrary opinion for this court to say that the statute is void because, although no district as formed contains less than three-fourths of the ratio, but several thousand more, yet some districts should have contained still more and others less to more nearly approximate equality? How many more, or how many less? Or because some districts might have been made more compact? How much more? Who shall draw the definite line across this legislative field, where none is drawn by the Constitution? And where shall it be drawn? How can the courts lay down any rule founded on legal principles and not on mere arbitrary opinion by which it can be determined how near above the minimum of four-fifths the Legislature must approach the ratio of 75,026 to make the apportionment valid? The rule of mathematical approximation requiring the nearest approach to equality mathematically possible, could not, of course, be applied, and at the same time the other constitutional requirements be obeyed, as before pointed out. Such a rule might possibly be adopted where, as in some of the States, each county is allowed one member of the Assembly, and the surplus of members is apportioned to the counties having the largest fractions of representative population. But that is not the method contemplated by the Constitution of this State.

“The apportionment, as made by the Act of 1893, does not make the districts vary as much in population as from a fifth below to a fifth above the ratio. Here is a wide latitude, in a populous State, for inequality, it must be admitted; and we do not mean to say that the Legislature could have arbitrarily formed a district containing simply the constitutional minimum of four-fifths, and another district adjoined with one-fifth or more above the ratio, when by taking a county from the larger and adding it to the

smaller district, greater equality in population and compactness of territory could have been secured, for in such case, it might perhaps be said that the principles of compactness of territory and approximate equality in population, above the minimum, had been disregarded and not applied at all by the Legislature. But no opinion is expressed as to whether such an apportionment would be valid or not, for by the statute in question, the lowest number of inhabitants in any district is, in round numbers, 62,000, which is an approach toward the ratio (75,026, the standard of equality) of 2,000 above the minimum of four-fifths of the ratio. It is therefore seen that the Legislature did have in view, and did apply, to some extent, the principle of approximate equality in population, above the minimum fixed by the Constitution, not the nearest approximation, it is true; and it might well have been contended in the legislative body itself, having the power to determine the question, that justice and equality in representation, as contemplated by the Constitution, required a much closer approximation.

“It follows, also, that it cannot be said that the Legislature wholly failed to have in view and apply the principle of compactness of territory. No district, unless a circle or a square, could be so compact that it could not be made more so. Nor can it be said, we think, that this construction gives to the phrase ‘contiguous and compact territory,’ as used in the Constitution of 1870, no more force than the phrase ‘contiguous territory’ as used in the Constitution of 1848. The territory forming the districts under the Act of 1893 is not contiguous, merely, but is, to some degree, compact. Doubtless a district could be formed of counties so ‘strung out’ and barely touching, as to make the territory contiguous but not compact in any sense, but we cannot see that such a district has been formed.

“It would seem plain that in the instances men-

tioned in the Wisconsin and Michigan cases there was no approximation toward equality in representation, for where one district contained in the one case more than twice, and in the other nearly three times, the population of another district, the Legislature could not at all, in those instances at least, have regarded the injunction of the Constitution to make the apportionment 'according to the number of inhabitants.' "

The act of apportionment giving the city of St. Louis only six districts, instead of seven, as we have heretofore shown she was entitled to, clearly indicates that the Legislature ignored the mandate of the Constitution requiring all districts to be as near equal in population as they could be made.

This failure of the act to give the city of St. Louis seven senators, constitutes such an abuse of discretion on the part of the Legislature as to render the entire apportionment invalid. If the city of St. Louis is to be given seven districts instead of six, as she must, then the remaining portion of the State will have to be apportioned into one district less than it now has under this apportionment, which of course will necessitate a substantial change in all the other districts of the State, those of Jackson county, probably, excepted.

This one defect is sufficient to invalidate the entire act of apportionment; but we are not called upon to rest this opinion upon a single defect, for the record discloses the fact that the Legislature, as previously pointed out, grossly abused its discretion in the same manner as to several other districts, especially regarding the variation between the population of the largest and the smallest districts; also in failing to observe the constitutional requirements regarding the compactness of the districts.

In the case of *State ex rel. v. Cunningham*, *supra*, the Supreme Court of Wisconsin, on pages 528-529, in discussing this question said:

"2. Chapter 482, Laws 1891, violates another constitutional requirement. Section 3, article 4, ordains that apportionments of legislative districts shall be made 'according to population,' excluding therefrom certain classes of persons therein specified. Because the county is the primary territorial unit in the formation of assembly districts, and members of the Assembly must first be apportioned to counties, the above provision of section 3, as applied to the formation of assembly districts must be construed to mean that there must be substantial equality of representation, in proportion to population, as between all the different counties, and districts composed of two or more counties; that is to say, there must be no unnecessary inequality in the proportionate representation in the Assembly of counties and of such districts on the basis of population.

"Each county and each district consisting of two or more counties having a population equal to the numerical unit of representation in the Assembly (alleged to be 16,868), is entitled absolutely to one member of Assembly unless it should be found necessary to place a county not thus entitled to a member in a district with a county which would otherwise of itself be entitled to one member. It is believed, however, that no necessity exists for forming such a district in the apportionment based on the enumeration of 1890. For each multiple of such numerical unit reached by the population of any county, such county is also absolutely entitled to an additional member of Assembly."

In *Sherrill v. O'Brien*, 188 N. Y. 185, 208-9, 211, an action by mandamus involving the validity of an apportionment of the State for senators, under which Queens county with a population in excess of the senatorial ratio had been joined to Richmond county forming the second district, and in which the Thirteenth district, a subdivision of the county of New York, was

not compact in shape, the court through CHASE, J., says:

“The citizen population of the State as shown by the enumeration of 1905 was 7,062,988. Dividing this number by fifty, as provided by the Constitution, gives a ratio of 141,259 for apportioning senators. With such ratio it appears that the county of New York was entitled to twelve senators; the county of Kings to eight and the county of Erie to three, in which counties the average citizen population to a district would be, respectively, 150,024, 147,347 and 146,192, and the county of Kings was entitled to one senator more than the number specifically provided for by the constitution as adopted in 1894, and under the new constitutional provision it increased the full number of senators in the State from 50 to 51. Deducting from the entire citizen population of the State the citizen population of the counties of New York, Kings and Erie, there remains a citizen population in the other counties in the State of 3,645,337, which, divided by 28, the number of senators outside of the counties of New York, Kings and Erie, gives a ratio for each senatorial district of 130,190. The counties other than New York, Kings and Erie, having a citizen population in excess of the ratio for apportioning senators are Queens, Westchester, Albany, Rensselaer, Oneida, Onondaga and Monroe. Each of these counties having a citizen population in excess of the ratio is entitled by any just and reasonable construction of the Constitution to at least one senator. [State ex rel. v. Cunningham, 81 Wis. 440; Parker v. State ex rel., 133 Ind. 178.]

“The minimum rights of such counties were determined by the enumeration and they could not be taken away by an exercise of discretion by the Legislature at least unless the geographical position of some small county was such as to make it absolutely necessary that it be joined with some one of such coun-

ties. No such absolute necessity required that Richmond county be joined to Queens county, or to any other county having its full ratio. Joining Richmond county to Queens county to make the second senatorial district was an exercise by the Legislature of an arbitrary power not authorized by the Constitution.

"The disregard of constitutional provisions in forming the Second and Thirteenth senate districts is clear, and they so affect the entire apportionment as to make it necessary to declare the act wholly unconstitutional and void."

In *Parker v. State ex rel.*, 133 Ind. 178, l. c. 192-196, the court said:

"Assuming, therefore, that the question is presented in such a manner as to require a decision, we proceed to an examination into the several provisions of what is known as the apportionment act of 1891, and to a comparison of such provisions with the sections of our State Constitution with which it is claimed they conflict. Before such comparison can be had, it is necessary to set out and analyze the provisions of the Constitution upon the subject of apportioning the State for legislative purposes.

"Section 2, article 4, provides that 'the senate shall not exceed fifty nor the house of representatives one hundred members; and that they shall be chosen by the electors of the respective counties or districts into which the State may, from time to time, be divided.'

"Section 4 of the same article provides that 'the General Assembly shall, at its second session after the adoption of this Constitution, and every six years thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years.'

"Section 5 provides that 'the number of senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties

according to the number of male inhabitants above twenty-one years of age in each: Provided, That the first and second elections of members of the General Assembly, under this Constitution, shall be according to the apportionment last made by the General Assembly before the adoption of this Constitution.'

"Section 6 provides that 'A senatorial or representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for senatorial apportionment, shall ever be divided.' We think it was the intention of the constitutional convention to secure to the electors of the State, by the provision above referred to, an equal voice, as nearly as possible, in the selection of those who should make the laws by which they were to be governed. The General Assembly has no discretion, in our opinion, to make an apportionment in disregard of the enumeration provided for by the Constitution.

"The enumeration required is not of the citizens generally, but of the inhabitants authorized to vote; and unless the General Assembly is to be governed by the enumeration, when made, in the matter of districting the State for legislative purposes, the enumeration is a useless ceremony, and an unnecessary expense. The purpose in requiring the enumeration is to fix the number of voters in each county, at the time the apportionment is made, in order that the Legislature may form districts so as to secure to each voter, as nearly as may be, an equal voice with every other voter, in the State, in the selection of senators and representatives. The cardinal principle of free representative government, that the electors shall have equal weight in exercising the right of suffrage, is recognized and secured. Representation according to population is the rule fixed by these several provisions of our Constitution, and the General Assembly has no more discretion, in our opinion, to disregard

this rule than it has to disregard any other plain provision found in that instrument. The enumeration, at the short periods of six years, was intended to secure a readjustment and correction of the inequalities that might arise from the growth or shifting of the population within that period.

“In argument it seems to be agreed that it was the intention to provide that, in making an apportionment among the several counties for legislative purposes, the integrity of the counties, when possible, should be preserved. This, we think, is true; and when that is done, it is plain that exact equality cannot be secured. But, because exact equality is not possible, the General Assembly is not excused from making such an apportionment as will approximate that equality required by the organic law of the State.

“A question somewhat similar to the one now under discussion arose in the Congress of the United States, in the year 1832, relative to the construction to be placed upon section 2, article 1, of the Constitution of the United States, which provides that, ‘representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers,’ etc. The committee, to whom was referred the question as to what was the constitutional method of apportioning unassigned representatives as between the States having fractions of population less than a full ratio, was of the unanimous opinion that the loss of members arising from the residuary numbers should be made by assigning as many additional members, as are necessary for that purpose, to the States having the largest fractional remainders.

“Upon that occasion Mr. Webster said: ‘The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of represen-

tatives among the several States, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule; it takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth, or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule.' The rule recommended by this committee was subsequently adopted by Congress, so that representatives are now apportioned among the several States of the Union under it as a fixed and binding obligation.

"The rule here announced is, we think, the true one. When it is found that exact equality cannot be attained, where the integrity of the counties is preserved, approximation becomes a rule as binding upon the General Assembly as any other rule fixed by the Constitution.

"It is said, however, that as to the fractions of the representative unit, the Constitution is silent, and that, therefore, the General Assembly has a discretion to provide for the representation of such fractions or to leave them unrepresented.

"That is true in a limited sense only. The Constitution requires that the State shall be reapportioned every six years according to the male inhabitants over the age of twenty-one years in each county. It con-

templates the formation of districts, each embracing as nearly as possible an equal number of the electors of the State. But the rule requiring an approximation to equality forbids the formation of districts containing large fractions unrepresented where it is possible to avoid it, while other districts are largely over-represented. That the General Assembly has much discretion in the disposition of the fractions of the unit of representation cannot be doubted, but it is not a discretion beyond control. In so far as the Constitution secures equality in representation, it is not silent as to the disposition of fractions, and the Legislature must dispose of them with a view of securing that end, otherwise an apportionment could be made which would give to one portion of the State nearly double the representation given to other portions. Constitutional provisions are seldom, if ever, to be construed as merely directory."

We are also of the opinion that the act of apportionment, as before stated, violates the Constitution, in that it does not conform to that provision which requires compactness of counties.

At another place, we have set out a map of several of them, which shows a total disregard of this Constitutional provision.

Heretofore, I quoted quite liberally from the opinion in the case of *People v. Thompson*, supra, treating among other things the failure of the Legislature of that State to obey the constitutional requirements, that in the formation of senatorial districts, the counties composing them should be contiguous and as compact as the nature of the work would reasonably permit. That language is peculiarly applicable to the facts of this case.

There as here, the evident intention of the people of the State, as manifested in said constitutional provision, is, that when counties are combined to form a district, they must not only touch each other, but

they must be closely united territory, and thereby guard, as far as practicable, the system of representation adopted in the State, against the legislative evil commonly known as the "gerrymander."

In the republican form of government, each citizen should have an equal voice in the enactment of the laws, their interpretation and execution. This is the true spirit and meaning of our Constitution and laws, and the judge upon the bench, in construing and giving them effect, should put aside party feeling and be governed solely by the spirit of the old proverbial saying: "*Tros Tyriusque mihi nullo discrimine agetur.*"

Inequality of representation in a republican form of government, is just as offensive and unjust, as is taxation without representation. Both are repugnant to and inconsistent with the American idea of government and true citizenship.

We have also quoted quite extensively from other authorities cited in this case, first, because the importance of the case demands a careful and full consideration of all the propositions presented; and, second, because what has been said by those able courts upon similar questions to those under consideration, applies equally well to this case, and they more fully express my views of the law governing the case than I could hope to do myself.

We are, therefore, of the opinion, that the act of apportionment is unconstitutional, null and void, and consequently the respondents cannot be required to obey it, by commanding them to subdivide the city of St. Louis into six senatorial districts, as is provided for by said act.

III. There is another reason, not assigned, however, by counsel, why the respondents should not be required to subdivide the city of St. Louis into senatorial districts, and that is this: We held in the first paragraph of this opinion that under section 7 of article 4 of the Constitution, the Governor, Secretary of

State and Attorney-General, in so far as apportioning the State into senatorial districts was concerned, were a Miniature Legislature, and consequently it could no more be compelled by mandamus to redistrict the State, than the Legislature proper could be. Now by section 6 of the same article the circuit courts in those counties which are entitled to more than one senatorial district, are required to subdivide those counties into the number of districts each is entitled to under the general apportionment.

From this it is seen, that the circuit courts of those counties are clothed with the same authority that the Governor, Secretary of State and Attorney-General have in regard to redistricting the remainder of the State; and if the courts have no authority to mandamus the latter, which clearly they have not, then by parity of reasoning they have no authority to mandamus the former because both are exercising legislative discretion.

We are, therefore, of the opinion, that the peremptory writ of mandamus should be denied, and that the alternative writ heretofore issued should be quashed; and it is so ordered.

All concur, but *Valliant, C. J.*, not for the reasons stated in the opinion, but for the reasons stated in separate opinion in which *Graves, J.*, concurs, and also in separate opinion filed by him; *Kennish, J.*, does not concur in what is said regarding the Campbell case.

SEPARATE OPINION.

VALLIANT, C. J.—This is an application to this court to issue its original writ of mandamus to compel the respondents, judges of the circuit court of the city of St. Louis, to divide the city into senatorial districts. Relator is a citizen and taxpayer in the city. In November, 1911, relator filed a petition in the circuit court

of the city asking the court to proceed to divide the city into senatorial districts as required by section 6 of article 4 of the Constitution, but the court refused the petition. Thereupon relator came to this court for a writ of mandamus, and on his petition an alternative writ issued. To that writ the respondents have filed a return stating that they refused to divide the city into senatorial districts for the reason that in their opinion there has been no valid apportionment of the State, that the apportionment made does not conform to the requirements of the Constitution as to compactness of territory or ratio of the population, and also that it was not signed by the Governor or proclaimed by him. Relator moves for a judgment on the pleadings.

The question on the threshold is, has this court jurisdiction of the case stated in the pleadings? Counsel for respondents in their brief say: "This is a proceeding by mandamus to test the validity of an apportionment of the State into senatorial districts contained in a certain statement of the districts filed in the office of the Secretary of State on April 18, 1911." That is doubtless the purpose of the suit, but if this court has no jurisdiction of the case it cannot pronounce judgment on the point in dispute and therefore anything that we might say on the subject would be simply the opinion of individuals.

We are satisfied we have no jurisdiction of the case presented. The relator is a citizen and taxpayer, having no more personal interest in the matter than any other citizen and taxpayer, having no official duty in connection with the matter, and what he is asking is that the judges of the circuit court, on whom a particular duty is imposed by express provision of the Constitution, be required to perform that duty. The duty so imposed, although it is laid on the circuit court, is not judicial in its character and could not be imposed on the court by any authority less than the Consti-

tution itself. The duty is purely legislative in its character and could be performed only by the General Assembly, but for the express provision referred to. In the briefs of counsel references are made to decisions in other States bearing on the question of the power of the courts to pass on the question of the validity of acts of a Legislature making apportionments of the State for representatives and senatorial districts. We will in the course of this opinion refer to some of those cases, but before doing so we deem it important to note particularly the requirements of our own Constitution which, though having in some respects features of similarity to others, has its own features of especial prominence.

The division of the powers of the State government are emphasized in a separate article too plain to admit of question: "Article 3. The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no persons or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others except in the instances in this Constitution expressly directed or permitted." There we have, first, a separation of powers, then a confiding of power, then a forbidding to exercise a power confided to another. Perhaps if article 3 had been omitted from the Constitution and articles 4, 5 and 6 inserted defining the duties of the three several departments, these articles, taken together, might be interpreted to mean that power of a separate character was confided exclusively to each, and, impliedly, that each was to keep its hands off the other, but if so the insertion of article 3 only emphasizes the anxious determination of the framers of our organic law to keep each department within its own bounds and leave the two others, each for itself, to perform the duty confid-

ed to it. That does not mean that either department in the performance of the duty confided to it may act contrary to the mandate of the Constitution, but it does mean that neither of the other two shall exercise the power confided to that one. The court may, in a concrete case, pronounce judgment on a question of the validity of a legislative act, but it cannot commit a legislative act, nor can it compel a legislative body to act.

Article 4 of the Constitution is devoted to the legislative department of the State government and it is that article alone that provides for the dividing of the State into representative and senatorial districts. Section 6 of article 4 provides that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be subdivided into districts of compact and contiguous territory," etc.

It is not given the circuit court to determine how many senators the county may have; that is left to the General Assembly in the first place, and failing the General Assembly to act, "it shall be the duty of the Governor, Secretary of State and Attorney-General, within thirty days after the adjournment of the General Assembly on which such duty devolved, to perform said duty."

Article 5 of the Constitution ordains: "The executive department shall consist of a Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General and Superintendent of Public Schools."

It was, as above said, on three of those executive officers that the duty of dividing the State into senatorial districts devolved, on the failure of the General Assembly to act. Suppose those three officers had failed entirely to perform that duty, what could the court do about it? The duty that they were to perform was a duty that devolved in the first instance on the

General Assembly and, but for this alternative provision, could be performed by no other magistracy. Suppose there was no such alternative provision, could the court by mandamus compel the General Assembly to perform that duty? The duty in the hands of the three executive officers was the very same as that devolved on the General Assembly, it was legislative work; in the language of the Constitution when performed "the same shall be as binding and effectual as if done by the General Assembly." Suppose they had refused to act in the matter at all, could we by mandamus compel them to act? Or if we should issue the writ and they should refuse to obey it what could we do? We are told that in this instance the Governor, for reasons that he thought right and just, refused to sign the document which the two other officers signed, and he refused to make the proclamation which respondents say was necessary; suppose we should think the Governor's signature and proclamation were necessary and suppose we should arrogate to ourselves the right to review the Governor's reasons and come to the conclusion that his reasons were unsound and that he ought to sign the paper and issue the proclamation, could we by mandamus compel him to do so? It will not do to say that it will only be necessary for this court to express an opinion on the point on which an opinion is asked and that all parties interested will bow; courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. The very fact that the court cannot enforce its judgment shows that the court has no jurisdiction of the subject. The three executive officers named might wholly fail to perform their duty and the court could do nothing to compel them. In one of the cases cited by respondents in support of the proposition that the courts have authority in a proper concrete case to pass judgment on the constitutionality of an act of appor-

tionment made by the General Assembly, and which does so hold (*People ex rel. v. Thompson*, 155 Ill. 451) the court said: "That there are many constitutional duties imposed upon other departments of the government which cannot be enforced by the courts, and the manner of compliance with which is left to the sole and final determination of the department upon which the duty is imposed, will not be denied, . . . Nor have the courts any power to compel the Legislature to act in any case, however imperatively the duty may be imposed on that body to act, so that if the Legislature should wholly neglect or refuse to pass an apportionment act after the lapse of ten years, and should leave in force an act under which the districts had become grossly unequal in population, the people would have no remedy outside of a constitutional amendment, except to elect a General Assembly which would perform the duty." In Missouri our Constitution provides that if the General Assembly fails to perform the duty, the three executive officers named shall perform it, but if they fail also there is no remedy that the courts can apply. And if the three officers meet and essay to perform their duty, but in doing so fail to follow the mandates of the Constitution, the court cannot lay its hands upon them and force them to make an apportionment in accordance with what it deems proper. Suppose we should go into the subject and conclude that the apportionment in question is unconstitutional, how are we going to remedy it? Suppose we had authority to say, and should say, that this apportionment is unconstitutional, what else could we do, what would be the result?

In another one of the cases cited by respondent (*People ex rel. v. Rice*, 135 N. Y. 473), the court said: "It is said that courts have no right to look at the consequences which may follow their decision of legal questions. This is quite an erroneous statement of the principle. After a decision has been come to, it is

true the courts have nothing to do with consequences. But in seeking for a correct solution of any legal question, especially the question of the proper construction of a statute or a constitution, the result which may follow from one construction or another is always a potent factor, and is sometimes in and of itself conclusive. . . . We have a right to consider the evil which would result from the prevalence of the alternative." The question in that case was whether an Act of 1879 or an Act of 1892 was the lawful apportionment act; the court said: "We are asked to say that in this act of 1892 the Legislature has abused or overstepped the discretion devolved upon it by the Constitution. What is the result that would follow? In the first place we should have every enumeration and every apportionment act brought before the courts for review, and it would not be necessary to act immediately, any citizen at any time during the running of the decennial period would have the right to invoke the aid of the court to set aside as void any such act, and leave the people to suddenly confront such a situation as is now presented. . . . The greatest confusion and disorder would result from a holding that this act is invalid."

So in the case before us, if we should go into the subject and conclude that the apportionment made by the Secretary of State and Attorney-General is invalid, and so declare, and if our judgment were binding on anybody, where would the people go to find an apportionment that is valid? We have no authority to compel these officers to meet again and make another apportionment and if we go back to the apportionment made ten years ago we might find that as faulty in some respects as this one, besides the fact that the growth and shifting of the population in the ten years past had rendered it inappropriate to existing conditions. The evil that would result from the exercise of such a power by the courts shows that the framers of our

Constitution never intended the courts to interfere in such matter.

The circuit court in performing the duty imposed in article 4 does not act in a judicial capacity; it is not required that parties litigant having personal rights to be adjudged, or official duties to be directed, should appear, but that the judges composing that court should come together of their own motion and perform that legislative function. In the case stated in the pleadings there were no parties litigant before the circuit court, nobody's private rights of person or property were in issue, there was nothing to call into action judicial powers.

The legislative duty to be performed by the judges is special and limited. Authority is not given them to determine how many senators their city is entitled to have; they in their legislative capacity have no authority to review or pass judgment on the act of apportionment made either by the General Assembly or the three executive officers; their duty is simply to divide the city into as many senatorial districts as there are senators apportioned to the city. In this case they say that for reasons which they assign they will not divide the city into senatorial districts; if they will not, that is the end of it, whether their reasons are good or bad; we have nothing to do with it; they are *pro hac vice* a part of the legislative department of the State and beyond our reach.

Whether, in a proper concrete case made, an apportionment made by the General Assembly can ever be questioned in court on the ground of its constitutionality cannot be decided in this case because no such concrete case is now here. Without yielding the point that every act of the General Assembly is liable to assault in court on the ground that it is unconstitutional, we may say in reference to an apportionment act that there is a large discretion given to the Legislature in the exercise of the power to make the apportionment

and that as long as the act challenged is within the bounds of that discretion it cannot be held to be unconstitutional. The cases cited by respondents point out that fact. Just how a case could be made to bring the question before the court it is not for us now to say, but some light on that subject may be obtained by reference to some of the cases cited by respondents. *People ex rel. v. Thompson*, 155 Ill. 451, was a suit at the relation of the State's Attorney for that county against the county clerk, to compel him to issue notices of election to be held October 15, 1894, under the apportionment act of 1882, the petition stating that the apportionment act of 1893, was unconstitutional. The clerk had issued notices of election as called for in the Act of 1893. The question was whether the election was to be held under the apportionment act of 1882 or that of 1893. The court held that the Act of 1893 was valid. It was in that case that the language we have above quoted from the Illinois court was used. In *People ex rel. v. Carlock*, 198 Ill. 150, relator was a candidate for the office of representative in the General Assembly; defendant was the county clerk and as such refused to file relator's certificate of nomination on the ground that the act of the Legislature making the apportionment of 1901 was unconstitutional, and that the Act of 1893 was the valid law. The court held that the Act of 1901 was the valid act.

State ex rel. v. Cunningham, 81 Wis. 440, was a suit by the Attorney-General against the Secretary of State to enjoin him from giving notice of election under the apportionment Act of 1891. The court held that the act was unconstitutional and sustained the injunction. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, was a suit by a private citizen as relator against the Secretary of State to restrain him from issuing notices of election and from filing and preserving in his office certificates of nominations, etc., on the ground that the

apportionment was unconstitutional. The court sustained the injunction.

People ex rel. v. Rice, 135 N. Y. 473, was a suit by mandamus against the Secretary of State requiring him to issue notices of election under the apportionment Act of 1879 and restraining him from filing election returns under the Act of 1892. The question was whether the Act of 1879 or that of 1892 was the law. The court held that the Act of 1892 was valid and denied the mandamus. It was in that case that the language of the New York court above quoted, in reference to the consequences that would result from declaring an act of apportionment invalid, was used.

Whilst, as already said, there is some similarity in the constitutions of other States and ours on this subject, yet there is also sufficient difference to account for the difference in the decisions. By the Constitution of New York adopted in 1894 it is expressly provided that: "An apportionment by the Legislature, or other body, shall be subject to review by the Supreme Court at the suit of any citizen, under such reasonable regulations as the Legislature may prescribe." That constitutional provision was not in force when the case of People v. Rice, *supra*, was decided, but the insertion of that provision in the Constitution of that State seems to indicate that it was thought by the framers of that Constitution that without it power to review such facts did not exist in the courts. We have nothing of that kind of our Constitution.

Viewing the judges of the St. Louis Circuit Court in the character of an arm of the legislative department of the State in respect of the duty imposed on them by section 6 article 4 of the Constitution, we hold that we have no more authority to compel them to perform that duty than we would have to compel the General Assembly to perform its part of the same act, or to lay our hands on the chief executive and the other executive

officers and compel them to perform their part of the same act.

For this reason the writ of mandamus should be denied.

Graves, J., concurs in these reasons for denying the writ, and in separate opinion adds some further views of his own.

SEPARATE OPINION.

GRAVES, J.—I fully concur in the elegantly expressed views of the learned Chief Justice in this case. Such views dispose of the case and properly dispose of it without a mass of mere *obiter*. The principal opinion of our learned associate is full of questions which should not be discussed, because the discussion thereof is but *obiter dictum*, and does not bind this court nor any other body. The third and last paragraph of the opinion written by our learned brother Woodson, in twenty-two lines not only disposes of the case, as it should be disposed of, but such paragraph makes all that precedes it *obiter dictum* pure and simple. These questions, so discussed, should be left for a live case, in which a discussion of the questions would rise from the plane of pure *obiter* to that of judicial decision.

The universal rule of this court on such question has been well expressed by our brother LAMM, in *Donnell v. Wright*, 199 Mo. l. c. 313, whereat it is said: "In leaving this view of the matter, it should be said (to guard against misunderstanding) that the question is not here, and, therefore, we do not decide, that an opinion of this court holding plaintiff has no case at all on the facts and the law, which opinion is followed by a judgment of reversal only, leaves the identical issue on the identical facts open to re-agitation in a new suit—it being meet to dispose of that question only when reached as a live matter in a live case, and not *obiter*, or by the by."

So we say in the case at bar. Both the opinion of the learned Chief Justice and of our learned associate say that we have no jurisdiction of this case. Both opinions say that the respondents in this case in the matter of arranging the senatorial districts in the city of St. Louis are performing a purely legislative function over which this and no other court can, under our Constitution, exercise superintending control.

Under our Constitution one branch of the State government is prohibited from interfering with and trespassing upon the duties imposed by the Constitution upon the other branches thereof. The legislative function cannot be regulated by judicial action. We cannot compel legislative bodies to act, nor can we enjoin them from acting. This is a subject-matter beyond the jurisdiction and power of this court. When we are asked to either mandamus or enjoin a legislative body, the only reply we can make, is, that, under the Constitution, the subject-matter is beyond our jurisdiction. That is what should be done in this case and what is done by both opinions. Then why discuss a lot of questions in a case over which we have no jurisdiction. Why say the case is one over which we have no jurisdiction, and yet proceed to pass upon the alleged merits?

Such discussion decides nothing, because it is mere *obiter*. Especially should it not be done in this case where the parties in actual interest have never been heard in this court.

If the question of gerrymandering senatorial districts were properly before us, and if the beneficent doctrine of estoppel could be invoked, then respondents and their predecessors in office would certainly be estopped from charging the political offense of "gerrymandering." Courts can take judicial notice of senatorial districts and their boundaries. With such notice we would be forced to say that the most ill constructed senatorial district in the State (outside of the

cities) would pale into insignificance when compared with some of those to be found in the city of St. Louis, which latter are the handiwork of respondents or their predecessors in office. But this is a question not in this case, because this court has no jurisdiction of the subject-matter of this action, i. e., no jurisdiction of a case which seeks to have us compel a legislative body to act.

For these reasons, I concur in the views expressed by the Chief Justice.

MONMOUTH COLLEGE, Appellant, v. THOMAS J. DOCKERY.

In Banc, March 28, 1912.

1. PARTNERSHIP: Fraud by One Partner: Liability of Other.

For the act of a partner, done in the name of the firm and within the scope of the partnership business, the other member of the firm is liable; and the fact that he himself has done no wrong, is immaterial. One partner has authority to bind the firm in all transactions within the scope of the partnership business; and the misrepresentation of facts, made by one partner to a client of the firm who is held out to such client by the other as authorized to act for the firm, is binding on the firm; and if that other partner represents, within the scope of the firm's business, that the title to a piece of land is good in the fictitious owner, and thereby the client is induced to loan money thereon, which is appropriated by the defaulting partner who in the name of the firm has the transaction in hand, the firm and the other partner are liable for the money.

- 2. ———: ———: ———: Mortgage: Agreement for Abstract of Title.** An agreement that, before any notes secured by a deed of trust were sold, an abstract of all conveyances of record affecting the title to the land should be furnished to the purchaser, showing that the deed of trust securing the notes was recorded and the title approved by the purchaser or his attorney, is one made in the interest of and as a protection to the purchaser, and a failure by the purchaser to require these things, will not relieve the partner of the man who conducted the trans-

action and imposed a forged and fraudulent note on the purchaser, from reimbursing the loss due to the false representations. Besides, in this case, there is no substantial evidence of such an agreement.

3. ———: ———: ———: **Sharing Commissions with Purchaser.** An honest agreement by the firm making the loan to share the commissions with the lender's treasurer, is immaterial when the firm is sued for fixing up and imposing on the lender a fictitious and fraudulent note. If it was not honest, but a part of a scheme to defraud the lender, entered into by its treasurer and the firm, then the firm was a party to it, and it is still no defense to any member of the firm.
4. ———: ———: ———: **Negligence of Lender.** The defrauded member of the firm making the loan has no right to complain of the negligence of the lender in not sooner discovering the fraud if he himself, having the means at hand, did not sooner discover it. The partner who has done no wrong cannot be heard to charge the lender with such negligence unless the defrauding partner could make it.
5. **FRAUD: Limitations: Discovery: Pleading.** It is not always necessary for a plaintiff, in an action for fraud and deceit, to which the defense of the Statute of Limitations is interposed, to aver that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate. And if he merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, the defendant cannot, on appeal, complain of the defect in the pleading.
Held, by WOODSON, J., dissenting, that in order for plaintiff to avail itself of the exception to the Statute of Limitations which prevents it from running, it was necessary to plead it; and that necessity for the plea was not waived by defendant, for when evidence was offered to sustain the exception the defendant objected, and one objection is enough.
6. ———: ———: ———: ———: **Defects Available on Appeal: No Demurrer.** It is only when a pleading fails to state a cause of action or a defense, or fails to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. And an objection to a petition that it does not state a cause of action, made after the answer is filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable a consideration as a general demurrer timely interposed. In such case, if by

reasonable inference from the facts stated, a cause of action can be constructed, it is the duty of the court to do so.

7. ———: ———: **Plea: No Reply: Practice: Appeal.** A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it; but the usual course is to wait until the answer is filed pleading the statute, and then avoid it by a reply. But in such case if plaintiff should fail to file a reply to the plea and the cause goes on to trial and proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on trial, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings.
8. ———: ———: **Concealment: Diligence: Partners.** The law does not require of one that he should suspect fraud; on the contrary, all transactions are presumptively honest. Where there has been concealment, or where there is a relationship of trust and confidence, or where there is nothing in the transaction at the time the fraud is perpetrated, and nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out. On the other hand, the law requires the defrauded person to be reasonably watchful of his interests, and will not relieve him from it if he has been negligent in that respect.

Where a firm had in a course of dealing running through two or three years been trusted with absolute faith by a college in the loaning of its money, and soon after it had begun making loans through the agency of the firm sent its representative to inquire into the firm's standing in the community and to view the securities, and was assured by the defendant partner that the other partner had the business of these loans in hand, and then after the confidence of the college was entirely obtained, the other partner used an impecunious person named Smith to obtain a loan on his own land and had the notes signed by Smith, and in the firm name certified that there were no mortgages or liens on the land except the deed of trust securing this loan to Smith, which had been assigned to the firm, that the title was good in Smith and the deed of trust recorded, and when the notes were received by the college it honored the firm's draft, and thereupon the defaulting partner placed the amount to the firm's credit and checked it out, and paid the interest for three years, concealing the whole transaction from defendant and the college for that length of time, the college cannot be held to be negligent of its duty in not sooner discovering the fraud, and the Statute of Limitations did not begin to run against the college when the fraud was first perpetrated, but only upon its discovery by the college.

Held, by WOODSON, J., dissenting, (1) that the loss occurred through the negligence of the college in not demanding for three or four years the deed of trust which it was agreed should be furnished to it as security for the loan; and (2) the most ordinary business prudence on the part of the college would have exposed the fraud, and when so exposed the five-year Statute of Limitations would have at once begun to run, and the suit is barred on that theory.

Held, by GRAVES, J., dissenting, that knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to the discovery of fraud; and applying this rule, the facts show that the well established rule of doing business between the college and the partnership required the firm to forward to the college, along with the notes, an abstract of title, a certificate of title of a certain firm of attorneys, and a deed of trust recorded, and a failure to forward any of these things within a reasonable time was sufficient to put the college, or any prudent person, upon inquiry, and to start the Statute of Limitations to running.

Held, by BROWN, J., dissenting, that the college might have waived the delivery of the abstract of title and the certificate of their attorneys, in view of the certificate of the firm, who were abstracters, that the title was vested in Smith; but as it had always been the custom for the college to receive a deed of trust whenever it made a loan, and none was sent in this case and no inquiry was made why it was not sent, and no investigation was made, the college was guilty of gross negligence, which was sufficient to set the statute to running.

9. **PARTNERSHIP: Scope of Authority: Finding of Fact.** A finding by the trial judge sitting as a jury that the defaulting partner acted outside the scope of his authority, is not a finding of fact, but is only an opinion on a point of law.
10. **FRAUD AND DECEIT: Appellate Practice: Simple Reversal.** Where all the facts are before the court in an action of fraud and deceit, tried by the court sitting as a jury, there is no necessity for a new trial; and the judgment for defendant being wrong, it will simply be reversed, and the trial court directed to enter judgment for plaintiff.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton*, Judge.

REVERSED AND REMANDED (*with directions*).

Campbell & Ellison, Safford & Graham, and Gage, Ladd & Small for appellant.

(1) A partner is liable for the fraud of his copartner if committed in the name of the partnership and within the apparent scope of the partnership business, although he be entirely ignorant of it, receive no benefit from it and the fruits of the fraud are appropriated by his copartner to his own use. Story on Partnership (7 Ed.), secs. 108, 166; Bates on Partnership, sec. 476; Lindley on Partnership (Ewell's Ed.), p. 314; Hayner v. Crow, 79 Mo. 293; Winship v. Bank, 5 Pet. 566; Church v. Sparrow, 5 Wend. 223; Gilchrist v. Blande, 58 Wis. 184; Wolf v. Mills, 56 Ill. 360; Tenney v. Foote, 95 Ill. 908; Bank v. Kinnare, 174 Ill. 358; Darlington v. Garrett, 14 Ill. App. 243; Alexander v. State, 56 Ga. 478; Wine Co. v. Weippert, 14 Mo. App. 483; Grocery Co. v. Cole, 26 Mo. App. 5; Dudley v. Love, 60 Mo. App. 420; Sadler v. Lee, 6 Beavan, 324; Eager v. Burnes, 31 Beavan, 579; St. Aubyn v. Smart, L. R. 5 Eq. Cas. 183; Rhodes v. Moules, L. R. (1895) 1 Ch. 236; Lindu v. Crowley, 29 Kan. 756; Pahlman v. Taylor, 75 Ill. 629; Boardman v. Gore, 15 Mass. 331; Burgess v. Bank, 4 W. P. D. Bush (Ky.) 600; Coleman v. Pearce, 26 Minn. 123; Iron Co. v. Harper, 41 Ohio St. 101; Jackson v. Todd, 56 Ind. 406; Todd v. Jackson, 75 Ind. 272. (2) This court will set aside a verdict of a jury or a finding of a trial court unless the same is supported by substantial evidence. Whitsett v. Ransom, 79 Mo. 258; Garrett v. Greenwell, 92 Mo. 120; Long v. Moon, 107 Mo. 334; Nugent v. Milling Co., 131 Mo. 252; Payne v. Railroad, 136 Mo. 580; Sanguinette v. Railroad, 196 Mo. 494; Weltmer v. Bishop, 171 Mo. 116; Avery v. Fitzgerald, 94 Mo. 207; Flynn v. Wacker, 151 Mo. 552; Champagne v. Hamey, 189 Mo. 726; State v. King, 203 Mo. 571; Deane v. Transit Co., 192 Mo. 585; Story v. Story, 188 Mo. 129; Hethcock v. County, 200 Mo.

170; *Brewing Co. v. St. Louis*, 209 Mo. 600; *Bond Co. v. Houck*, 213 Mo. 440; *Efron v. Car Co.*, 59 Mo. App. 645; *Meier v. Proctor & Gamble Co.*, 81 Mo. App. 419; *Stafford v. Adams*, 113 Mo. App. 721; *Joy v. Cale*, 124 Mo. App. 576; *Pickens v. Railroad*, 125 Mo. App. 674; *Schaub v. Railroad*, 133 Mo. 448; *Com. Co. v. Aaron*, 130 S. W. 118. (3) There is no substantial evidence to support the finding of the court as to an arrangement or an agreement between plaintiff's treasurer and Dockery & Hilbert, as to the method or plan by which loans were to be made by Dockery & Hilbert for the plaintiff; and that finding ought to be set aside. (4) Even if an arrangement or agreement regarding the method of conducting the loan business had been made between the plaintiff and Dockery, as found by the court, it could have afterwards been modified, or compliance with its terms waived by the parties; and it was so modified and waived. *Bank v. Lonergan*, 21 Mo. 46; *Hays v. Bank*, 101 Ky. 201. (5) There is no substantial evidence to support the finding of the court as to the method pursued in all other loan transactions with the plaintiff; and that finding ought to be set aside. (6) The court erred in finding that the transaction was without the scope of the authority of Hilbert. There is no evidence in support of that finding. (7) The court erred in finding the plaintiff guilty of negligence and of failure to exercise ordinary diligence. There is no evidence to support the finding. (8) The conclusion of law by the circuit court that the action was barred by the Statute of Limitations, was error.

Higbee & Mills and *Morton Jourdan* for respondent.

(1) In view of the allegations as to the course of business adopted between plaintiff and defendants, the presumption must be that the plaintiff relied upon the certificate and guarantee of title, and not the rep-

representations made in the application, nor the letter accompanying the application. The money was paid after the receipt of the certificate of title. The petition charges that at the time the notes were presented defendants falsely represented that the notes were secured by a deed of trust which is a first lien on said lands. This evidently refers to the certificate of title. (2) All prior and contemporaneous representations as to title were merged in this certificate and guarantee of title, which was received and accepted by plaintiff before the money was paid, and the suit should have been based on the false certificate and guarantee of title. It was the final representation. No money was parted with upon the representations of title contained in the application, or the letter accompanying it. Of course, the application was approved, upon condition that an approved abstract of title should be furnished. The money was paid upon the certificate of title, which was the sole and final expression of the will and agreement of the parties, and becomes the only admissible evidence of the contract. 21 Am & Eng. Ency. Law (2 Ed.), 1079; *Ringer v. Holtzclaw*, 112 Mo. 523; *Kellerman v. Railroad*, 136 Mo. 189; *Standard Co. v. St. Louis Co.*, 177 Mo. 571; *State v. Chinn*, 19 Mo. 233; *State v. Evers*, 49 Mo. 545; *State v. Bohle*, 182 Mo. 58; 2 *Parson's Contracts* (8 Ed.), p. 545; *Graham v. Sadlier*, 165 Ill. 95. Hence the suit should have been bottomed upon the false certificate and guarantee of title, and not against defendant individually. (3) There was substantial evidence to support the finding of the court that the transaction was without the scope of the authority of Hilbert, and so known to plaintiff and its treasurer at the time. Plaintiff had no right to make a loan on a certificate of title. Plaintiff alleges in its petition that there was a course of business adopted; that the blank application for loans should be filed "with a description of the security offered for proposed loans," and "plain-

tiff accepting the representations of said defendant firm, concerning the character and value of the security offered, and the character of the proposed borrower, as being true." The evidence is unquestioned that in every other loan transaction defendants submitted abstracts of title approved by Ellison & Campbell. Whether the act of Hilbert was within the scope of his authority or was consented to by Dockery, was a question of fact. 22 Am. & Eng. Ency. Law (2 Ed.), 139 (c); Dowling v. Bank, 145 U. S. 512; Deardorf v. Thatcher, 78 Mo. 128. (4) Plaintiff's reckless disregard of the course of procedure adopted, and to be followed in the making of loans, and its laches in not requiring an abstract of title, and in not calling for the deed of trust, estops it from prosecuting this action. Defendant was grossly prejudiced by plaintiff's negligence. It is such laches as will defeat plaintiff's action. Laches is such neglect or omission to assert a right as taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. 18 Am. & Eng. Ency. Law & Proc. (2 Ed.), 97, 100; Kline v. Vogel, 90 Mo. 239; Newman v. Newman, 152 Mo. 398; Hudson v. Cahoon, 193 Mo. 457; Loomis v. Railroad, 165 Mo. 469. (5) If an abstract of title had been prepared in this case, Dockery would have known it, and defeated the fraud. (6) This action is barred by the fifth clause of the Statute of Limitations. There is no averment of any effort to discover the fraud, or any trick or artifice to conceal it. The petition therefore shows on its face that the cause of action was barred by the five-year Statute of Limitation. County v. Bragg, 135 Mo. 291; Callan v. Callan, 175 Mo. 346; Stark v. Zehnder, 204 Mo. 442; Loomis v. Railroad, 165 Mo. 494; 19 Am. & Eng. Ency. Law (2 Ed.), 250, 252; Hudson v. Cahoon, 193 Mo. 547; Teall v. Schroder, 158 U. S. 172; Clark v. Leon,

108 Iowa, 250; *Felix v. Patrick*, 145 U. S. 317; *Hart v. Heidweyer*, 152 U. S. 547. (7) Payment of interest not pleaded nor relied upon to take the case out of the Statute of Limitations.

VALLIANT, C. J.—Plaintiff, an Illinois corporation, sues to recover \$12,000, with interest, which it alleges was obtained from it by defendant through fraud and deceit. It is not disputed that the money was obtained from the plaintiff by fraud and deceit and it is not charged that defendant Dockery was, in person, guilty of any of the fraud or deceit that was practiced in the transaction, or that he did in person obtain any of the money in question. But defendant was a member of a business firm or copartnership doing business under the name and style of Dockery & Hilbert, and the fraud was practiced in the name of the firm by Hilbert, defendant's partner, and the money was obtained by Hilbert in the name of the firm, without the knowledge of defendant Dockery. It is, therefore, a case in which one of two innocent parties must suffer, and the question is, must the defendant suffer for the wrongdoing of his partner or must the plaintiff suffer from the wrongdoing of defendant's partner?

There is no dispute about the main facts in the case. At the time of this transaction and for several years prior, defendant and Edwin L. Hilbert were partuers in trade under the style and firm name of Dockery & Hilbert. Their business was dealing in real estate, making and negotiating loans on real estate, etc. They did the largest business of that kind that was done in Kirksville, Missouri, where they lived. Their personal and commercial reputation was of the very best; even Hilbert, for integrity and financial strength, was, at that time and for two or three years thereafter, highly esteemed among business people in Kirksville.

They also conducted a title abstract business in the name of the Dockery & Hilbert Abstract Company, a corporation in which they owned practically all the stock and of which defendant Dockery was president and Hilbert was secretary. The business of that concern was conducted in the office of the firm. In the name of that corporation abstracts and certificates of title were issued and used by the firm in their business of dealing in real estate and making loans.

They also allowed an insurance business to be conducted in their office and in the name of their firm, by a young lady who was an employee of theirs, and the bank account relating to that business was kept in the firm name, the deposits and checks being made by Hilbert in the firm name, but the business was owned by the employee who conducted it and they had no interest in it.

They advertised their business as real estate, loans, insurance, law and abstracts.

The plaintiff began having money lending transactions with the firm of Dockery & Hilbert as early as 1899, and had made several loans through them before the loan in question in this case. By these previous transactions the plaintiff's confidence in the firm seems to have been so well established that it made them its exclusive agents for placing loans in Adair and other counties, as the following letter from the firm to the then treasurer of the college indicates:

Kirksville, Mo., 7—21—1899.

MR. R. A. WILSON,
Monmouth, Ill.

Dear Sir: We are in receipt of your communication of the 20th inst., in which you state to us that you were somewhat disappointed on failure to receive money due The Monmouth College and that the same will not be in readiness for you before the 30th of this month. In answer to your inquiry will say that it will be no inconvenience for us to advance the money in this loan and then we can assign the papers to you.

We thank you for the invitation to continue to forward to you good applications, which we will do. We will give you a \$2200 loan

on the early part of this coming week. We also have several other loans which we hope to close for you in the near future.

We would like, if agreeable to you, to enter into an arrangement by which we could become your financial agents for Adair and adjoining counties. It appears to us that it would be more satisfactory to both ourselves and you to have an arrangement of this kind, as we could understand each other better, and on our part of it it would do away with the embarrassment of having to compete with several agents working for the same firm as ours. If you can see your way clear to make us your exclusive agents for Adair and adjoining counties, we will guarantee you that we will loan your money in a very short time and on the most desirable securities for the rate obtained. Hoping we will be able to complete an arrangement such as suggested by this letter, we will now close our remarks and await your reply.

Very respectfully,

DOCKERY & HILBERT.

The firm really enjoyed a high reputation, it had the confidence of the community, and, so far as this record shows, its business transactions, until the occurrence of this transaction, were of a character to inspire confidence. For use in their loan-negotiating business they prepared a printed form of an application to be signed and sworn to by the applicant for the loan, which application became the basis of the negotiations. This form was so drawn that it showed the utmost care to disclose all the facts that a cautious lender would desire to know. In the usual course of business this application, when signed and sworn to by the applicant, would be shown to the prospective lender, and, if the loan was made, would be delivered to him with the other papers. This form of application was used in the loan which is the subject of this suit, and although it is long we deem it of sufficient significance to copy it in full:

*Application to Dockery & Hilbert, Kirksville, Mo., or Their Assigns,
for a Farm Loan.*

It will be absolutely necessary to fill all the following blanks and answer each question fully or the application will be returned therefor.

1. Applicant's full name is Frank Pierce Smith.
2. Age is 35 years.

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3. Wife's full name is—Single.
4. Age is—
5. P. O. address, Kirksville, in Adair county, Missouri.
6. Amount of loan wanted is twelve thousand dollars (\$12,000) for a term of five years, with interest at the rate of five and one-half per cent per annum, to be paid annually; notes and mortgage to be drawn upon your customary form of blanks. The security offered is described as follows (show position on diagram). (Show any exceptions, such as school lot, church lot, burial ground, railroad rights of way, etc.).
7. The west three-fourths ($\frac{3}{4}$) of section twenty-seven, and the northeast quarter ($\frac{1}{4}$) of section twenty-eight (28) (excepting one hundred feet off of the entire west side of the last mentioned quarter section, which is reserved for railroad right of way). All in township sixty-four (64) north, of range sixteen (16) west of the 5th Principal Meridian—aggregating six hundred and forty (640) acres, more or less.
8. Containing in all 640 acres, situated in the township of Nineveh, county of Adair, Missouri.
9. Located two and one-half miles from Nineveh the nearest station on the I. & St. L. Railroad:
Division of crops for last year and yield. Five miles to Novinger, on the O., K. C. & E. Railway and five miles to Greentop on Wabash Railway. Two miles to Fegley, inland town. Two and one-half miles to Shibley's Point, inland town. (These must equal total number acres described.)
One hundred and sixty acres in corn, 50 bushels. — acres in oats, — bushels. — acres in wheat, — bushels. Forty acres in meadow, $1\frac{1}{4}$ tons. Thirty acres in other crops. Forty-one hundredths acres in orchard. Four hundred and ten acres in pasture. — acres in —. Eighty acres in timbered pasture. — acres in grove. Six hundred and forty acres total.
10. How many acres are under cultivation? Five hundred and forty.
11. How many acres were originally prairie? Four hundred and fifty to five hundred.
12. What is the general character and quality of the soil?
13. How many acres are fenced? Six hundred and forty.
14. Kind and description of fence? Wire.
15. How many acres are wet or otherwise unfit for the plow? None.
16. Is the land watered? Yes.
17. How? Wells.
18. Is the land rolling or flat? Almost level.
19. Does it need ditching? No.
20. How many rods of open ditch upon the land?
21. How many rods of tile? None.
22. How many acres subject to overflow? None.

23. Is the land rented? No.
24. To whom?
25. Until what date?
26. At what rental?
27. What is the usual annual rental value, per acre, of similar property in the vicinity? Three dollars to three dollars and fifty cents per acre.
28. What encumbrance now on the land? None.
29. What is the last assessed value on above property for taxation? Six thousand four hundred dollars.
30. Is the above land on a public road? Yes.
31. When did you purchase the land? October, 1901.
32. What did you pay for each tract? \$25,600. (If purchased in parcels, state details.)
33. What were the terms of purchase? Cash.
34. State in detail what improvements you have made thereon since you bought it, and are any buildings begun and not finished? None.
35. What is the money value of such improvements? \$——.
36. What buildings are on above land? One and one-half story frame dwelling, small barn, cribs, granary, etc. (Give size, material when built, and what used for.)
37. On which forty acre tract are they located? N. E. N. E. (28).
38. For what amount insured? Seven hundred dollars.
39. In what company? Old line of ——
40. When does policy expire? 1904.
- (Note: Fire insurance policies, subject to mortgage and subrogation agreement, without co-insurance clause, and in companies satisfactory to the lender, will be taken out for the benefit of the loan, if required.)
41. I own other land of the value of \$3500 encumbered for \$——.
42. I own —— head of horses and mules, —— head of cattle, —— head of hogs, and —— head of sheep.
43. For what purpose is this money applied for to be used? To build new house and barn, purchase stock, and improve premises.
44. Are there any suits, attachments or proceedings pending or judgments unsatisfied against you in any court, State or United States? No.
- The applicant to have the privilege of making payments of \$100, or multiples thereof, on account of principal on any interest-paying day.
45. The present actual cash value of the lands is
- | | |
|-----------------------------|-------------|
| 640 acres, at \$40 per acre | \$25,600.00 |
| acres, at \$—— per acre | \$ |
| acres, at \$—— per acre | \$ |

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Total	\$25,600.00
46. The present cash value of the buildings is	950.00

47. Total value at present	\$26,550.00
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State of Missouri, County of Adair, ss.

The applicant, being duly sworn, deposes and says the statements above are true and correct in every particular, and are made for the purpose of obtaining a loan, as above applied for; that he is of lawful age; that he is in peaceable possession of the property; that his title and possession is at this time unquestioned; that he is neither principal or surety on any bond which is by law a lien on said premises; that there are no mortgages or other liens unsatisfied upon said premises, or suits pending against him in any court of record of this State, or of the United States, which can result in a lien thereon that will not be removed before the loan is completed; that there is no liability of any lien being filed by mechanics, or others, which can take precedence of the lien of the loan above applied for; that there are no unrecorded deeds or mortgages except such as are shown by the abstract submitted; he understands that the loan hereby applied for is to be made upon the representations as to said premises above described, and the title to the same, made by him in this application.

FRANK PIERCE SMITH, Applicants.

Subscribed and sworn to before me this 21st day of November, 1901.

JAMES C. WATSON,
Notary Public.

Com. ex. Aug. 26, 1902.
(Seal.)

That is the application which Dockery & Hilbert under their firm name forwarded to the plaintiff and with it they forwarded also an appraisalment of two freeholders resident of the county, who certified that the property was worth \$26,400, and also the report of a local agent selected by the firm who certified that the applicant, Frank Pierce Smith, was a man of good character and credit, that the cash value of the land was "\$25,000 or more," and the value of the buildings \$700. In addition to those documents, Dockery & Hilbert inclosed to the plaintiff a certificate of title bearing the caption of "Thos. J. Dockery, Pres.; Edwin L. Hilbert, Secy. Certificate and guarantee of title by the Dockery & Hilbert Abstracting Company," and certifying that they had examined the records of

Adair county and found the title to the real estate described in the application "to be good, in Frank Pierce Smith, that there were no mortgages, trust deeds, judgments, taxes or liens of any nature whatever except a deed of trust in the sum of twelve thousand dollars to Dockery & Hilbert now assigned to Monmouth College . . . and recorded in Trust Deed Book 40 of the records of said Adair county. We further certify that said deed of trust is the first lien on the above described real estate." At the foot of the certificate, after the signature, is this: "(Have the only complete set of abstracts to all lands in Adair county)."

These documents were inclosed to the plaintiff in a letter from the firm in which the property is described as "one of the finest farms that can be found in north Missouri," and also the statement that lands in that county are assessed "at about one-fourth the value or less." The letter concluded with the statement: "You would not find a more desirable security on which to place your money. Awaiting your reply, we will remain, very respectfully, Dockery & Hilbert."

All the statements made in the application and certificates of appraisement and valuation were true with two important exceptions; that is, the statement that the title to the property was well vested in Frank Pierce Smith and that he was a man of good character; the truth being that Frank Pierce Smith never owned any interest in the property, but was a totally impecunious and financially irresponsible man; the property belonged in fee to Hilbert, the defendant's partner.

On the showing thus made the plaintiff agreed to make the loan. Thereupon Dockery & Hilbert drew their draft on the plaintiff, payable to the Baird National Bank, for \$12,000, and accompanied the draft with the promissory notes of Frank Pierce Smith, one

for \$12,000 for the principal, and five for \$660, each for interest; the plaintiff paid the draft, and the money was placed by the bank on its books to the credit of Dockery & Hilbert, and was drawn out in the course of business on checks of Dockery & Hilbert.

Defendant Dockery, as a witness in his own behalf, testified that he did not know that the firm of Dockery & Hilbert kept an account with the Baird National Bank. Yet that account, or so much of it as was shown in evidence, began in February, 1901, and continued until August, 1904, and during that period the deposits to the credit of Dockery & Hilbert amounted to \$140,493.80. The firm also had an account with the National Bank of Kirksville running from February, 1901, to July, 1904, the amount of deposits of which is not shown, but the account showed checks drawn against it by the firm in the handwriting of Hilbert to the amount of \$18,168.36. Defendant Dockery testified that he did not know that such an account was kept in that bank; he only learned the fact the day before he testified. It was also in evidence that the firm had a small bank account with the Kirksville Savings Bank; the deposits from September, 1898, to March, 1903, amounted to about \$26,000. Dockery testified that he did know something about that account, and the evidence was that he drew one of the checks against it, which was the last check, to withdraw the balance in April, 1905; all the rest of the checks against that account were drawn by Hilbert in the name of the firm. Mr. Dockery also testified that they kept no partnership books of account, in which loan transactions were entered; that when a transaction was closed he and his partner then and there divided the commission earned, and there it ended.

The \$12,000 note in question was payable to Dockery & Hilbert, and indorsed by them without recourse; it recited on its face: "This note is given for an actual loan of the above amount, and is secured by a deed

of trust of even date herewith, which is a first lien upon the property described therein." These notes were payable at the office of Dockery & Hilbert pursuant to an agreement between them and the plaintiff made during their previous transactions at the request of Dockery & Hilbert, the plaintiff acceding to the request on condition that the moneys be remitted to plaintiff without cost.

The plaintiff loaned the money on the faith of the sworn application, the certificates as to values, the certificate of title and the letters of the firm. There was no deed of trust forwarded with the papers.

The first three interest notes were paid; the money being remitted to plaintiff by Dockery & Hilbert. When the fourth interest note came due it was not paid at maturity, but \$560 was paid thereon by Hilbert in December, 1905, the firm of Dockery & Hilbert being then dissolved. The failure to pay that note started investigation which led to the discovery of the fraud, and, according to the testimony of defendant Dockery, it was the first of his knowledge that this \$12,000 loan had been made.

In this transaction all the signatures of the firm were written by Hilbert. It was in evidence that in the prosecution of the loan business Mr. Hilbert, almost without exception, did the clerical work, preparing the papers, etc., and he did the principal part of the letter correspondence. Defendant Dockery himself testified that Hilbert did most of the correspondence with Monmouth College. In January or February, 1901, which was nearly a year before the transaction in question, the plaintiff then having some loans outstanding which it had made through this firm, sent a representative to Kirksville to investigate the standing of the firm and look over the securities on which its loans had been placed. He first went to all the banks in town, made inquiries of them about the standing of Dockery & Hilbert and made like inquiries of men in other kinds

of business and having satisfied himself on that point, inquired of a gentleman whom he met on the street the way to the office of Dockery & Hilbert; that gentleman said: "There comes Mr. Hilbert," whereupon the Monmouth College man spoke to Mr. Hilbert, and those two went to the office of the firm and there the Monmouth College man was introduced to Mr. Dockery by Mr. Hilbert as "Mr. Buchannon of Monmouth, where we have some loans made." But Mr. Dockery was in conversation with some other men at the time, and said to this representative of the Monmouth College: "Mr. Hilbert is looking after that part of the business largely. I have other things to look after." Then the Monmouth man and Mr. Hilbert went out together and drove over some farms on which the loans had been placed.

It was admitted that Hilbert made a voluntary assignment for the benefit of creditors in October, 1904; that claims aggregating about \$100,000 were proven up against his estate; which paid about twenty cents on the dollar. He left the State in November, 1907, and has not since been heard of. The land mentioned in the Frank Pierce Smith application and other lands of Hilbert were sold by the assignee, and defendant Dockery and Mr. Pickler were the purchasers.

The suit in the beginning was against both members of the firm, but no service being had on Hilbert and he having left the State it was dismissed as to him. Defendant Dockery filed an answer in which he admitted his partnership with Hilbert, and admitted the transaction by which the plaintiff was defrauded of the \$12,000, and averred that it was the result of a fraudulent conspiracy between Hilbert and Frank Pierce Smith, and that defendant Dockery knew nothing about it. The answer also averred that for some years prior and subsequent to November, 1901, the firm of Dockery & Hilbert "did negotiate and sell

notes secured by deeds of trust to plaintiff upon certain definite rules and conditions made between defendants and plaintiffs, by its treasurer, its agent in that behalf, before any such notes were sold to plaintiff, to-wit: that in all cases before any note should be sold by them to plaintiff, an abstract of the conveyances of record affecting the title to real estate conveyed to secure the payment of such note or notes should be furnished to plaintiff, showing title in fee to said real estate in the maker of such note or notes," and that the notes were secured by deed of trust duly recorded and the title approved by the plaintiff or its attorneys. And the answer alleges: "That plaintiff's said treasurer and defendants were copartners in said transactions and shared the commissions on all notes sold by defendants to plaintiff under the terms of said agreement."

Then the answer goes on to say that Hilbert and Smith without the knowledge of defendant Dockery "entered into a conspiracy for the express purpose of cheating and defrauding the plaintiff and this defendant out of the sum of \$12,000; in pursuance of which conspiracy" they executed the papers above mentioned including the notes and a deed of trust, and obtained the money, but Dockery knew nothing of it until the—day of December, 1905; that it was negligence on the part of the plaintiff to have bought the notes without a full abstract of title approved by its attorneys, "contrary to and in violation of the terms and conditions" above mentioned; that if plaintiff had required such an abstract it would have shown that the certificate of title furnished by the Dockery & Hilbert Abstract Company on which plaintiff relied was false. That if plaintiff had informed defendant Dockery at any time within three years after the transaction that it had bought these notes he could have required Hilbert to pay the same and have protected himself; wherefore plaintiff is estopped to prosecute

this suit. The answer pleads also the five-year Statute of Limitations.

The reply was a general denial and a specific denial of the alleged agreement as to terms and conditions on which loans were to be made, but that if any such agreement was made it was not observed and was waived; that if the alleged agreement with its treasurer to divide commissions was made, it was without the knowledge or consent of plaintiff.

The evidence bearing on the affirmative defences pleaded in the answer will be stated later when we come to consider them. The trial was by the court, jury waived. The court found for the defendant on the issue relating to the alleged agreement as to the manner of conducting the business and that the plaintiff was guilty of negligence in paying the draft of Dockery & Hilbert for \$12,000 under the circumstances, and "that the negotiation of said notes under the circumstances and without an abstract of title and the opinion of attorneys thereon, was without the scope of the authority of said Hilbert, and so known to the plaintiff and its said treasurer at the time;" that if plaintiff had used ordinary diligence it could have discovered the fraud within a month, and the money could have been collected off of Hilbert. The court also found for the defendant on the plea of the Statute of Limitations. From that judgment the plaintiff appealed.

I. Aside from the affirmative defenses set up in the answer, the plaintiff's prima facie case is so clear that discussion would seem almost out of place. But when one comes into court denying his liability growing out of a transaction conducted by his partner in trade in the name of his firm and in relation to a matter within the scope of the business of the partnership, it may be well to refer to the fundamental principle of law on which every partnership is builded and

without which no partnership business could be conducted, and also without which no one would dare deal with a member of the firm in the absence of the other partner or partners. Every one perhaps feels a sympathy for a man who is called into court to answer for the wrongdoing of his partner, who has abused his trust and used the firm name to commit a fraud for his own benefit, but that sympathy cannot alter the law. The authorities cited in the brief of the learned counsel for the appellant are so appropriate that we will quote from some of them.

Mr. Justice Story, in his work on partnership, after laying down the doctrine of the general authority of each partner to bind the firm in all transactions within the scope of the partnership business, says that it has its foundation not only in common convenience and public policy but is almost a matter of moral necessity; he says it gives to all and each of the partners the entire administration of all the partnership business. [Story on Part. (7 Ed.), sec. 103.] And continuing the subject he says (Sec. 107): "Thus the representation of any fact, or a misrepresentation of any fact, made in any partnership transaction, by one partner, will bind the firm." Then in section 108 the law writer says: "The principle extends further, so as to bind the firm for the frauds committed by one partner in the course of the transactions and business of the partnership, even when the other partners had not the slightest connection with, or knowledge of, or participation in the fraud; for, as has been justly observed, by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns. Hence, if, in the business of the partnership, money is received partly by one of the firm and partly by another, to be laid out upon a

mortgage, and a mortgage is forged by one partner without the knowledge of the other, the innocent partner will be liable for the whole money. So, if representations of certain facts, as existing, are fraudulently made by one partner, unknown to the others, in the partnership business, and the facts never existed, but the whole statement is mere fiction, the firm will be bound to the same extent as if it were true, and the facts existed. This whole doctrine proceeds upon the intelligible ground that, where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or occasion of the confidence and credit reposed in such third person."

The Supreme Court of Illinois has expressed the law thus: "No legitimate partnership contemplates, as a part of its business, the commission of frauds or of acts prohibited by law; yet, when a partner in the course of the partnership business commits a fraud or does acts prohibited by law, the firm is liable, although the other partners have no knowledge of such frauds or illegal acts." [Tenney v. Foote, 95 Ill. 99, l. c. 108.] In a later case the same court said: "It is a matter of no consequence whether a partner is acting fairly with his copartners in a particular transaction or not; if the act is within the apparent scope of his authority, and professedly for the firm, his acts and representations are binding upon the firm in favor of the indebtedness of a third party . . . Parties dealing with a partner in good faith, without any notice, must have their rights determined in the same manner and be governed by the same rules as if they were in fact dealing with the full knowledge and consent of all the members of the firm." [Trust & Savings Bank v. Kinnare, 174 Ill. 358, l. c. 362-3.]

In this case not only did Mr. Dockery by entering into partnership with Mr. Hilbert impliedly say to all the world that his partner was a man of good faith

and integrity and worthy of all confidence, but when Mr. Buchannon, representing the Monmouth College, came to Kirksville to investigate the standing of the firm and to look over the farms on which the former loans had been made, sought to converse with Mr. Dockery as the head of the firm, the latter turned him over to his partner, saying "Mr. Hilbert is looking after that part of the business largely; I have other things to look after." Is it strange then that the representative of the college should thereafter place confidence in Mr. Dockery's partner and treat with him as the firm? Nearly if not quite all the papers that were written in course of their other business with the college, and the letters in relation to them, were written by Mr. Dockery's partner, and Mr. Dockery knew that fact. Not only did the college have the high reputation of the firm to rely on, but also its past transactions with the firm conducted in an entirely satisfactory manner by Mr. Hilbert, and the affirmative statement of Mr. Dockery to Mr. Buchannon that that business was entrusted especially to Mr. Hilbert because he (Mr. Dockery) had other matters to look after. On that assumption the plaintiff's business relations with the firm continued nearly two years before the transaction now complained of, and this was the first fraud committed. Therefore unless the plaintiff is precluded by the affirmative defense pleaded, it is entitled to recover.

II. Now let us consider the affirmative defense set up in the answer, to-wit, the alleged agreement as to the manner of conducting the business, and the plaintiff's alleged negligence in failing to require a complete abstract of title and opinion of a lawyer thereon. In the answer it is alleged that for some years prior and subsequent to November, 1901 (the date of this fraudulent transaction), the firm did negotiate and sell to plaintiff notes secured by deeds of trust

“upon certain definite rules and conditions, made between defendants and the plaintiff by its treasurer, its agent in that behalf, before any such notes were sold to plaintiff, to-wit, that in all cases before any note should be sold by them to plaintiff an abstract of all conveyances of record affecting the title to the real estate” should be furnished the plaintiff showing that the deed of trust securing the notes was recorded and the title approved by plaintiff or its attorneys.

Taking the alleged agreement as it is stated in the answer the question arises. For whose benefit was it made, whose interests was it to protect, why should care be taken to see that the security on which the plaintiff was lending its money was good and that there was no false representation as to title? Was it because one partner distrusted the other and demanded this security? Did Mr. Dockery then have any suspicion of the integrity of his partner? Will he now say that he made that contract to protect himself from any fraud that his partner might commit? If he would so say he would put himself in a worse attitude than the evidence in this case now puts him. He would put himself in the attitude of one who being suspicious of the integrity of his partner yet held him out to the world as a man worthy of all trust. He will not say that. Then for whose protection was the alleged agreement made? Unquestionably it was for the protection of the party who was lending the money. If then that party having a right to demand a complete abstract with the lawyer's indorsement of it, did not, in this instance, insist on the strict letter of the supposed contract, but trusted to the honor of the firm and accepted in lieu of a complete abstract a certificate of title made by the Dockery & Hilbert Abstract Company, can the firm complain, or can any member of the firm complain? Can the firm or any member thereof be heard to say to the plaintiff: “You trusted us too

far; you should not have placed confidence in our integrity; when we sent you the application supported by the sworn statement of the applicant (whom we certified to be a man of good character), which statement one member of our firm knew to be false but the other did not, and sent you a certificate of good title from our abstract office in the handwriting of a member of our firm, and when we wrote you that this was an especially choice loan, in a letter bearing the signature of the firm in the handwriting of the partner who had conducted all our correspondence with you theretofore and thereafter and to whom, as the member of our firm especially intrusted with your business, we referred your Mr. Buchannon when he came to visit us in our home town and in our office, still when we did all this you should not have trusted us, you should for the protection of the other member of our firm, have demanded a complete abstract indorsed by a reputable lawyer." If the court would sanction that defense it would introduce a very great discord in the system of laws on the subject of partnerships.

In this connection we note also that the answer says: "That plaintiff's said treasurer and defendants were copartners in said transactions and shared the commissions on all notes sold by defendants to plaintiff under the terms of said agreement." We are at a loss to understand just what the defendant means by that. It is pleaded in connection with and as a part of this alleged agreement. The answer does not say that that agreement was made with the plaintiff or with the knowledge of the plaintiff, but with the plaintiff's treasurer whom they took into copartnership and with whom they divided the commissions on loans made by the college. Surely the defendant does not mean to say that he was a party to a contract to corrupt by bribery the plaintiff's agent; he would not do such a thing as that, therefore we may put that out of view. Assuming then that it was an

honest agreement the only other significance it has is that the firm agreed to do the business of the plaintiff for half commissions; a totally immaterial fact and therefore mere surplusage in the answer.

Before turning to defendant's testimony offered in support of the alleged "definite rules and conditions" agreed on, let us see how the question of negligence stands. Defendant has not intimated a charge of bad faith on the part of the plaintiff, he has not said or implied that the plaintiff conspired with defendant's partner to put out its \$12,000 on worthless security for the benefit of Hilbert and the injury of Dockery, but he says that plaintiff has been negligent in trusting too implicitly on the integrity and good faith of defendant's partner. Is defendant Dockery in a position to talk about anybody's negligence in the conduct of this business? He says he knew nothing about it until the failure to pay the fourth installment of interest brought exposure of the fraud. Why did he not know it? If his knowledge was of any consequence as affecting his liability, he cannot excuse his want of knowledge except he take refuge in implicit confidence in his partner, and to take that refuge is to confess his own negligence. By his own testimony the little attention that he paid to the business of the firm convicts him of negligence. For years before and years after this transaction he suffered his partner to deal with this plaintiff and others in the business of negotiating loans and gave them little or no attention. The firm had bank accounts in three of the banks in the town where he lived, yet two of those accounts he did not know existed, and the third one he only knew at its close and drew the one check to close it. The account in the Baird National Bank ran from February, 1901, to August, 1904, and embraced deposits of over \$140,000, including the \$12,000 in question, yet he knew nothing of it; he trusted it all to his partner. Mr. Baird, the president of the bank, testified that

he had known the defendant for over forty years. Here then we have a prominent business man in a small city, well acquainted with the president of one of the principal banks, and not knowing that his firm had a large account there. Yet into that very account has passed the plaintiff's \$12,000 to the credit of the defendant's firm, was there mingled with other deposits and drawn out on checks of the firm. Whatever may be said of Mr. Hilbert's other acts in relation to this loan it cannot be said that he acted in a secret manner with this \$12,000, after it was collected, to conceal it from his partner. He deposited it to the credit of the firm in one of the most prominent banks in the city and there it remained, as well as we can judge by the size of the checks drawn after the date of the deposit, for several months; at least there is no check whose size indicates that it was aimed especially against that deposit, but it went out in a number of small checks. We gather from the evidence that into that bank account went the insurance business that was conducted in the office of the firm and in the name of the firm with the knowledge and consent of defendant, but in which neither he nor the firm had any interest. In suffering that business to be so conducted the defendant manifested great confidence in his partner, who made the deposits and drew the checks against it, but it was allowing the firm name to be used for a purpose outside of the partnership business, and if the privilege had been misused or abused or if loss had resulted from mismanagement the firm would have been liable. Yet the defendant, knowing that this insurance business was being so conducted, knowing that considerable money would change hands in the course of that business and knowing that a bank account would naturally be required, paid no attention to it, but trusted all to his partner. We are not criticising the defendant for his amiable indulgence in this matter, but refer to it only in con-

nection with his complaint that he has suffered by the negligent manner in which the Monmouth College, an educational institution in another State, conducted its business intrusted to his care in Kirksville. Men have a right, so far as concerns themselves, to conduct their business as loosely as they please, but when they conduct it loosely and in consequence thereof a third party is injured, they are not in a favorable position to complain that the injury would not have resulted if the injured party had been more careful than they themselves were.

Now let us turn to the testimony of the defendant and see what evidence he offers to sustain the allegation in his answer that there were "certain definite rules and conditions" agreed to between himself and the plaintiff's treasurer. After referring to former loans that the firm had made for the college, he was asked by his counsel: "Q. Now, just tell the court, if you please, what arrangements you had with the college about negotiating these loans? A. Well the arrangement with the college was the ordinary way of making loans. We were first to submit the application and after the loan was accepted we were to forward a note and deed of trust with the abstracts. Of course the note was usually —." At this point plaintiff's counsel said they thought they were entitled to know with whom the arrangement was made. After some talk it was said that the arrangement was made with Mr. Wilson, the former treasurer, who was dead, and also with Mr. Woods, the present treasurer, and the court ruled that the witness might tell what his agreement with Mr. Woods was, but could not repeat any talk he had with the dead man. Defendant was then asked by his attorney: "Q. At the very start state whether or not all of these abstracts of title were furnished? A. In every case? Q. Before the notes were cashed? A. Yes, sir." And in answer to further question he said the abstracts were examined by

Ellison and Campbell. Then this question and answer next appear: "Q. Now, did you have any talk with Mr. Woods about the plan of making a loan? A. Yes, sir; I told him that the plan we had formerly would be pursued if it was satisfactory and Judge Ellison and Campbell to examine the abstracts." The above extract contains every word we can find in the record offered to prove the alleged agreement of "certain definite rules and conditions made with the treasurer." The treasurer, as a witness for plaintiff, denied that he had such a conversation with Mr. Dockery or either member of the firm. There was other evidence tending to show that in former and subsequent transactions abstracts approved by the attorneys above mentioned usually, though not always, were received with the notes before the drafts of Dockery & Hilbert were paid, and in cases where the drafts were paid without the abstracts and deeds, on the attention of Dockery & Hilbert being called to the fact, the documents were supplied, but there was no case where the plaintiff refused to pay the draft of Dockery & Hilbert because the abstract and deed were not present. It may, therefore, be said that the evidence tends to support the contention of defendant that such was the custom, but there is no evidence that there was an agreement that the plaintiff would not pay a draft of Dockery & Hilbert until all these documents were present. Mr. Dockery did not so testify; when his own counsel pressed him on the point the extent to which he would go was: "Well, the arrangement with the college was the ordinary way of making loans." Then he went on to say what the ordinary way was, and when asked to state what talk he had with Mr. Woods he said: "Yes, I told him that the plan we had formerly would be pursued if it was satisfactory and Judge Ellison and Campbell to examine the title." In his answer to the first question he indicated only the ordinary way in which his firm con-

ducted its business, that is, he said he arranged with the college to conduct its business in the ordinary way, then when pressed to say what he said to Mr. Woods he said I told him that the plan we had formerly would be pursued if satisfactory. How in the world it could be presumed that Mr. Woods would understand that as being an admonition to him not to trust Mr. Dockery's partner, and a binding obligation on his part never to pay a draft drawn on him by the firm until he had taken every precaution to guard against the possibility of one partner defrauding another, the writer of this opinion is unable to see.

We hold that there was no substantial evidence to support the alleged agreement of "certain definite rules and conditions" on which the business was to be conducted.

And we also hold that even if there had been such an agreement its terms could have been waived by the party for whose protection it was made, and even if it could be construed into an agreement for the protection of the firm it could be waived by the firm and what the firm could do any member in the name of the firm could do.

III. The plea of the five year Statute of Limitations. The money was obtained from the plaintiff December 2, 1901, the fraud was discovered in December, 1905, the suit was begun May 4, 1907. Defendant insists that it is not sufficient to avoid the Statute of Limitations for the plaintiff to show that it did not discover the fraud until December, 1905, but it must also show that it used due diligence to discover it, and defendant says that the plaintiff in its pleadings and proof only shows that it did not discover the fraud until that date; therefore, the statute is not avoided.

Fraud is a very subtle subject, it is cunningly devised and artfully perpetrated; concealment is in its very essence. The law does not presume fraud,

it does not require of one that he should suspect fraud in every transaction; and, although it requires him to be reasonably watchful of his own interests and will not relieve him if he has been negligent in that respect, yet the mere fact that a transaction turns out after a length of time to have been fraudulent, does not put the victim beyond the pale of the law. If there was nothing in the transaction at the time, or nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out.

This is a suit against two men composing a business copartnership; the theory of the plaintiff's complaint is that they are liable under the law of partnership; one of the partners being beyond the reach of process the suit is dismissed as to him and prosecuted as to the one who is served and who defends. This defendant is not sued on account of any act of his own, but on account of the act of his firm; having personally done no wrong, if he is not liable under the law of partnership, he is not liable at all; and if he is liable for the act of his partner, done in the name of the firm and within the scope of the partnership business, the fact that he has done no wrong himself is immaterial. If he is not liable because he was Hilbert's partner he is not liable at all, and if he is liable because he was Hilbert's partner he is as much liable as Hilbert would be if he were here defending, and he can make no defense that Hilbert could not make. If Mr. Dockery can be heard to say that the plaintiff should not recover because it was negligent in not discovering the fraud sooner, Mr. Hilbert could avoid liability on the same plea. Each might have couched his plea in different words, but each plea would have been of the same legal effect; Mr. Hilbert might have said to the plaintiff, "You ought not to have trusted me, you should have suspected that I was a thief and you should have come from Illinois and instituted an in-

vestigation;" while Mr. Dockery could only have said, "You ought not to have trusted the man whom I held out to you and to the world as a man worthy of all confidence, you should have put a detective on his path and in that way enabled me to recoup against my partner for my liability to you." That in effect is what this defendant now pleads, but not in such plain words.

Defendant insists that the plaintiff's pleading does not state facts sufficient to avoid the plea of the Statute of Limitations, because, he says, it only states that the plaintiff did not discover the fraud until December, 1905, but does not show that it used any diligence to discover it before that time; and appellant in its brief says it concedes that the petition is defective in that respect according to our decisions, but that no objection of that kind was made in the trial court, and the cause was tried on the theory that the pleading was sufficient. It is not always necessary for a plaintiff to aver in his pleading that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate; the fraud may have been so concealed as not to arouse suspicion, in which event it would be sufficient to say that the defendant so concealed the fraud or so acted in relation to it as to allay apprehension. And the circumstances under which the fraud is perpetrated may be such that in its very concoction concealment is shown and suspicion averted, and so it was in this case, as the statements in the petition show. The petition states facts showing the plaintiff, an educational institution in another State, coming to Missouri to invest its capital, confiding its business to the firm of Dockery & Hilbert who the petition says "enjoyed not only in the said city of Kirksville, but in the adjoining States a reputation for probity and high financial standing, so that the representations and state-

ments of said partnership firm, and each of the members thereof, were readily accepted and acted upon as being true," etc. Then follow statements showing how, by a cunningly devised scheme of fraud and false swearing, a member of that high standing firm, acting in the name of that firm, obtained the plaintiff's money and plaintiff thus trusting did not discover the fraud for four years. The circumstances stated show by natural inference that the fraud rested alone in the breast of the guilty member of the firm and was so hidden that no suspicion was aroused, therefore it is not correct to say that the plaintiff's pleading to avoid the Statute of Limitations states only the mere fact that the fraud was not discovered until December, 1905. But in an action based on fraud and deceit, against which the Statute of Limitations is interposed, if the plaintiff merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, he cannot, on appeal, complain of the defect in the pleading. If at any time the sufficiency of the pleading in this particular had been questioned in the circuit court and adjudged defective, the plaintiff could have amended. It is only when a pleading fails to state a cause of action or a defense, or fails to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. There was no demurrer filed in this case, and no objection to the evidence on the specific ground of this alleged defect; the only objection to the plaintiff's petition in the circuit court was when the trial began defendant objected to any evidence because, he said, the petition did not state facts constituting a cause of action; there was no hint of any special defect. And when the trial came on and plaintiff offered evidence

tending to show that the payments of interest for the first three years were promptly remitted in the firm name of Dockery & Hilbert there was no objection on the specific ground that it was not so pleaded. When a party withholds his objection to his adversary's pleading at a period in the progress of the case when, if the objection is held to be good, the other party may amend, he should not be heard to make it when that period is passed, unless it is a vital point. Objection to a petition which comes after answer filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable consideration as a general demurrer timely interposed. In such case if by reasonable inference from the facts stated a cause of action can be constructed it will be the duty of the court to do so. [Young v. Shickle H. & H. Iron Co., 103 Mo. 324, l. c. 327; McDermott v. Claas, 104 Mo. 14, l. c. 21; Cobb v. Lindell Ry. Co., 149 Mo. 135, l. c. 143.]

A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it, but the usual course of pleading is to wait until the answer is filed pleading the statute and then avoid it by a reply, but in such case if he should fail to file any reply at all to the plea of the Statute of Limitations and the cause goes on to trial, proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on file, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings. [Henslee v. Cannefax, 49 Mo. 295; Meader v. Malcolm, 78 Mo. 550; Heath v. Goslin, 80 Mo. 310; Thompson v. Wooldridge, 102 Mo. 505; State ex rel. v. Phillips, 137 Mo. 259; Ferguson v. Davidson, 147 Mo. 664; Hall v. St. Joseph Water Co., 48 Mo. App. 365.]

The decisions of this court referred to by defendant to sustain his position that the plaintiff cannot recover because it has not shown due diligence in discovering the fraud are not like this case. *Shelby County v. Bragg*, 135 Mo. 291, was an action against the county clerk for fees received in excess of his salary. There was no question of pleading in that case, the petition sufficiently stated the facts relied on to avoid the Statute of Limitations, to-wit, that the clerk by his false statements and settlements concealed from the county court the true amount of the fees collected by him, and that was the proof on which plaintiff relied. But the court held that the statute made it the duty of the county court to examine each statement, that the records which it was the duty of the county court to examine would have shown that the statements were false and the county court was negligent in taking the false statements without examination. In that case the court said: "But it is well settled in this State, whether by force of the statute or independent of it, that a fraudulent concealment of a cause of action will delay the operation of the Statute of Limitation until after discovery of the fraud."

In *Loomis v. Railroad*, 165 Mo. 469, the plaintiff had stated in the petition not only his ignorance of the fraud but also that the defendants kept him in ignorance and acted "so secretly as not to put him on notice thereof." It was not, therefore, for any defect of pleading that the court held that he was barred by the Statute of Limitations, but because the evidence showed that as early as 1881 the plaintiff knew that the Atoka Company was working the mine and receiving his share of the proceeds, and to say now that he only discovered the fraud in 1890 would be to say that he willfully shut his eyes to the facts for ten years.

Callan v. Callan, 175 Mo. 346, was a suit for damages for the alleged fraudulent procurement from plaintiff by her brother of a deed conveying to him her interests in her father's estate and also land which her mother had given her; the petition alleged that the only consideration for the deed was a conveyance to her of sixty acres of land which her brother represented was worth \$6000, but which she afterwards found was worth only \$600; that she was inexperienced and trusted to what her brother told her as to the value of the sixty acres; also that she thought she was conveying to him only her interest in her father's estate, but afterwards discovered that the deed included also the land obtained from her mother. To avoid the Statute of Limitations the petition stated that the plaintiff was inexperienced, not on an equal footing with her brother in whose statements and the statements of the priest she confided, that she knew nothing about the value of the land and an examination by her would have been fruitless. In that case there was nothing to excuse the plaintiff for not knowing the contents of the deed she was signing, and nothing to prevent her from examining the sixty acres of land conveyed to her and forming her own opinion as to its value, and no act alleged to have been done by defendant to lull the plaintiff into non-action or to prevent her from discovering the fraud, and so the court said that the facts stated by her were not sufficient to avoid the statute.

Stark v. Zehnder, 204 Mo. 442, to which we are also referred, was a suit in equity to reform a deed by correcting a mistake in the description of the land; it was a case of alleged mutual mistake, not of fraud.

State ex rel. v. Yates, 231 Mo. 276, was a suit against the sureties on the bond of the treasurer of State Hospital No. 1. It was in some respects quite like *Shelby County v. Bragg*, above mentioned, and was decided on the theory that under the statute it was

the duty of the board of managers to examine the accounts of the treasurer and that the records in their office which it was their duty to examine would have shown that the treasurer was in default. There is a wide difference between a surety on a bond and a member of a business partnership. The surety, in the case last mentioned, might well say to the plaintiff, "You should not have trusted the principal, the law made it your duty to examine his accounts in comparison with your own records, but you neglected to do so." But can this defendant say that the plaintiff should not have trusted his partner or should not have trusted documents and letters bearing the commendation and indorsement of his firm? When letters and documents bearing the signature of Dockery & Hilbert were received through the mail by the plaintiff, the plaintiff did not know, and was not charged with the duty of knowing, whether the hand-writing was that of Dockery or of Hilbert, and the legal consequence so far as the plaintiff was concerned was the same whether the hand of the one or of the other wrote the firm name.

In *Vigus v. O'Bannon*, 118 Ill. 334, the defendant's intestate, Richard W. O'Bannon, had received from plaintiff for collection a life insurance policy then due for the sum of \$5000, on which he collected the full amount, but informed the plaintiff that he had collected only \$2000, which sum he paid to the plaintiff and told him he had compromised the claim for that sum. After O'Bannon's death plaintiff presented his claim for \$3000 against the estate, alleging that the collection of the \$3000 was fraudulently concealed from claimant during the lifetime of O'Bannon. The Illinois court held that the mere silence of the agent under such circumstances was concealment of the cause of action, and said that if the agent goes farther and makes affirmative statements and resorts to active measures to quiet his principal's suspicions, it is

fraudulent concealment that will take the case out of the Statute of Limitations. In that case the plaintiff could have gone to Chicago where the life insurance company had its office and made inquiry, or he might have written a letter to the company and inquired, but he did neither, he simply trusted to what his agent told him. The court said (we quote from the syllabus): "The failure to use ordinary diligence to discover the fraud may be excused where there exists some relation of trust and confidence, as principal and agent, client and attorney, *cestui que trust* and trustee between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and when it appears that it was through confidence in the party who committed the fraud that the other was prevented from discovering it." That is the law of righteousness and justice; it is the law in Missouri, as well as in Illinois.

In *Fisher v. Tuller*, 122 Ind. 31, plaintiff and defendant's ancestors had been partners; they had a claim against the United States Government, which was intrusted to Tuller to collect; he collected it in 1867, and reported to his partner that the claim had been rejected and could not be collected; he died in 1873, his estate was fully administered and settled in 1879; the plaintiff did not discover the fraud until 1884. The Indiana court, l. c. p. 35, said: "It is true that mere silence is not a concealment within the meaning of the statute. [Citing cases.] But here there was a positive representation made by a party whose position required of him the utmost good faith, and that representation was a concealment of the cause of action. Whatever may be the rule where no relation of trust and confidence exists, we are clear that where the relation does exist, as in this case, the bar of the statute cannot avail the party who misleads his partner by representing that a claim cannot be collected

when he has, in fact, collected it and appropriated the avails to his own use."

In the case at bar the firm of Dockery & Hilbert had not merely been entrusted with this one sum of money to invest, but in a course of dealings running through two or three years the plaintiff had come to trust them with absolute faith. Soon after the plaintiff began making loans through the agency of this firm, it sent over a representative to Kirksville to inquire of the firm's standing in the community and to view the securities; then when its confidence was entirely obtained this wrong was perpetrated, and for three years the interest was remitted in the firm name, the only purpose of which was to maintain the confidence and allay suspicion.

The notes given for the loans plaintiff made through this firm, not only those given in this transaction, but those given in all the other transactions, were by special request of Dockery & Hilbert payable at their office, they agreeing to receive and remit the money without cost. Therefore when they remitted the interest on this loan for the first three years, it was equivalent to saying this interest has been paid at our office and we remit the same to you. A more effectual method to allay suspicion and prevent investigation could not have been devised.

During all those years Mr. Dockery himself trusted his partner as a man of integrity and truth, not only trusted him himself, but held him out to the world as a man worthy of trust; there was nothing in the conduct of Mr. Hilbert during those years that aroused Mr. Dockery's suspicions, then how can he say the plaintiff should have distrusted him?

Reliance is placed on what defendant calls a finding of fact by the court that in this matter Hilbert acted outside of the scope of his authority; but that is not a finding of a fact, it is only an opinion on a point of law.

The judgment is reversed, and since all the facts are before the court there is no necessity of a new trial; therefore, the cause is remanded with directions to the circuit court to enter judgment for the plaintiff for twelve thousand dollars, with interest at six per cent per annum from May 4, 1907, until the entry of the judgment and for costs.

Lamm, Ferriss and Kennish, JJ., concur; *Woodson, Graves and Brown, JJ.*, dissent, and each files a dissenting opinion.

DISSENTING OPINION.

WOODSON, J.—I dissent from the majority opinion in this case, and will briefly state my reasons therefor.

In the first place it should be borne in mind that the respondent, Thomas J. Dockery, morally, is just as innocent of any fraud or wrong doing in this case as is the appellant itself, and probably more so, for the simple reason that he was lulled into supineness, not only on account of the splendid reputation Hilbert, his partner, bore for honesty, integrity and moral rectitude, in the community where he resided, but also on account of the implicit confidence which characterizes the fiduciary relation that exists between partners, akin—I was going to say—to that of husband and wife, but I will not sully that relation by comparing it with any other relation that exists.

Under that view of the case, the law should not be strained beyond the ordinary rule in order to hold Dockery liable for the misdeeds of Hilbert; nor upon the other hand, should it on that account be relaxed in order to relieve him from any legal obligation he owes to the college. The rights of each should be tested according to the cold letter of the law governing such cases.

I dissent from the majority opinion for three reasons:

First: Because this was what is called and known in financial circles, as a real estate loan; and it clearly appears from even a casual reading of the record in the case that the loss resulted to the college through its own negligence in not demanding the deed of trust, which it was agreed should be furnished to it as security for the loan, notwithstanding the conceded fraud of Hilbert, for which Dockery was only legally liable.

It stands undisputed, that had the college demanded the deed of trust, at any time within a period of some three or four years after the loan was effected, which ordinary business prudence required, the fraud of Hilbert, and the innocence of Dockery, would have instantly appeared, and the college could have enforced its claim against the land upon which Hilbert had agreed in writing to give the deed of trust, which of course was an equitable mortgage; and the land was more than ample to repay the loan.

Second: Because, as previously stated, the most ordinary business prudence on the part of the college would have exposed the fraud of Hilbert, and when so exposed the law then imposed upon appellant the duty of bringing suit for the redress of its wrongs within five years from that time, which was not done in this case.

Clearly, in my opinion, the cause was barred by section 4273, Revised Statutes 1899, and was not saved by the exception there provided for.

The subsequent payment of the interest on the loan by Hilbert was not sufficient to bring the case within section 4290 for the obvious reason that it was plainly the duty of the appellant to have demanded the security for the loan, the deed of trust, long before the first interest-paying day arrived; and had it performed that duty, fraud would have been exposed to the light, as clear as the noonday sun.

Third: It is an elementary rule of pleading, that in order for a party to avail himself of an exception or saving clause, in a Statute of Limitation, he must plead the facts which bring his case within that clause, and if he fails to do so, it will be unavailing to him at the trial of the cause.

In the case at bar, counsel in open court conceded, and the record shows, that the appellant did not comply with this rule of pleading; but counsel seek to escape the effect of it by saying that the evidence tending to show said exception was introduced without objection, and therefore respondent waived the right to now invoke that rule.

If the record showed the facts to be as just suggested, then there would be much force in that position. But as I read the record, the objection was timely and properly made, and was by the court overruled, and exceptions were duly saved. Clearly that was sufficient to preserve the question for review by this court; and the mere fact that counsel for appellant offered and the court admitted other evidence of like character to that admitted over the objections of respondent, did not waive the previous objection made to the same class of testimony. In other words, it is not necessary to preserve the right to have this court to review the rulings of the trial court to repeat objections made to the introduction of testimony. One objection to the same class of evidence is as good as a dozen. This is so firmly settled in this State that it requires the citation of no authorities to support it.

DISSENTING OPINION.

GRAVES, J.—When this case was first argued in the Division, my impression was that an affirmance should be decreed here. I yielded, however, to the masterly opinion of our brother VALLIANT and concurred in the divisional opinion. Upon the reargu-

ment of the case I am convinced that the judgment *nisi* should be affirmed, at least upon the question of the Statute of Limitations, and that my first impression was right.

This is an action at law, and were it not for the peculiar wording of our Statute of Limitations, the statute would begin to run from the consummation of the fraud and not from the discovery of the fraud. Without statutory provisions to the contrary, we have two rules for the application of the Statutes of Limitations to causes of action, (1) the rule in equity, which fixes the date of the accrual of the action at the date the fraud is discovered, and (2) the rule in law cases which fixes the date of the accrual of the action at the date the fraud is consummated. By statutes, many of the States have engrafted the rule in equity as to law cases, and in such States there is no difference. Missouri chances to be one of the States which has thus adopted the equitable rule in cases at law. The fifth clause of our five-year Statute of Limitations as to personal actions reads:

"Fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

It will, therefore, be seen that by statute we have made the old equitable rule applicable to law cases as well as equity cases.

But to the point in this case. When by statute we adopted that rule we adopted it with the exceptions which years of judicial experience had grafted upon it. That exception is well couched in 25 Cyc. p. 1186, thus: "There is, however, a well established qualification to the equitable rule that the statute runs only from the discovery of the fraud. Knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn

of the fraud, is usually deemed equivalent to discovery; and therefore not only in equity but generally in those jurisdictions where the equitable rule has been made applicable to actions at law, the statute runs from the time when by the use of reasonable diligence the fraud could have been discovered. In other words 'constructive notice of the fraud may constitute a discovery.' "

This court, in the recent case of *Callan v. Callan*, 175 Mo. 346, after setting out and discussing the statute which we have set out above, has applied the exception so well stated in 25 Cyc. supra. In so doing we quoted from the former case of *Shelby County v. Bragg*, 135 Mo. l. c. 300. In the *Callan* case, we used this language:

"A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. A party cannot avail himself of this exception to the statute when the means of discovering the truth were within his power and were not used. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

"If the aggrieved party knew of the fraud when it was committed, or had full possession of the means of detecting it, which is the same as knowledge, neglect to bring forward his complaint for more than six [five] years will deprive him of his remedy and ought to, upon the very principles and reasons upon which the Statute of Limitations was enacted. . . ."

After making the above quotation from the *Bragg* case, and *Farnan v. Brooks*, 9 Pick. 246, in the *Callan* case, supra, this court added this language:

"Indeed, the authorities are all one way upon this question. [Wood on Limitations, sec. 276; McKneeley v. Terry, 61 Ark. 527; Busw. Lim., sec. 385; Underhill v. Ins. Co., 67 Ala. 45; Ramsey v. Quillen, 5 Lea (Tenn.), 184; Adams v. Inhabitants of Ipswich, 116 Mass. 570; Tyler v. Angevine, 15 Blatchf. (U. S.) 536; Eiffert v. Craps, 58 Fed. 470.]

"And 'the bill or' complaint should set forth the nature of the transaction fully, and also the acts of concealment, and the time of its discovery. . . . The concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character and must be alleged and proved so as to bring the case clearly within the meaning of the statute.' [Wood on Limitations (3 Ed.), sec. 276.] The same rule is announced in Ware v. Galveston, 146 U. S. 116; Felix v. Patrick, 145 U. S. 317; Hardt v. Heidweyer, 152 U. S. 559.

"While the petition alleges that the fraud complained of was not discovered by plaintiff until September, 1898, it does not allege what the discovery was, nor does the proof show that it was by reason of anything that defendant said or did that it was not discovered earlier."

Applying these rules to the case at bar, how stands the case upon the Statute of Limitations? There is no question that there was a well established method of doing business between plaintiff and the firm of Dockery & Hilbert. That method required the furnishing of an abstract of title with an attorney's certificate of title. The attorneys to give the certificate of title were Campbell & Ellison. A deed of trust was to be recorded and forwarded. In this case the money was paid, but no deed of trust, abstract of title or certificate of title from Campbell & Ellison were ever forwarded. The failure to forward the deed of trust within a reasonable time was sufficient within itself to have placed plaintiff upon inquiry. Not only do

we have the plaintiff failing to get the deed of trust, but there is no abstract of title or certificate of the attorneys ever sent to it.

Such failure was sufficient to put any prudent person upon his inquiry. The means of discovering the fraud were at hand had plaintiff been exercising diligence. In such case, "*Knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to discovery.*"

This plaintiff had knowledge of such facts. It had parted with a big sum of money. It was the custom and rule of conduct for it to receive within a very short time after paying its money a deed of trust, an abstract of title, and an attorney's certificate of title. It received neither. Any prudent person with the knowledge of the facts (and the plaintiff knew them) would have begun an inquiry. Not so in this case, however. With knowledge of facts which would place any prudent person upon inquiry it made no attempt to get at the real facts, although the examination of the records would have disclosed the whole fraud. Under the course of business the papers were usually received within a few days. A few days more would have been time for the discovery of the fraud. In law the fraud must be deemed to have been discovered shortly after the usual time elapsed for the delivery of the deed of trust and other papers to the plaintiff. It being so deemed in law, the discovery was more than five years before the institution of this suit. The trial court was right in holding that plaintiff was barred by the Statute of Limitations.

II. Nor will it do to say that the plaintiff was lulled into security by the conduct of Dockery & Hilbert, through Hilbert afterward. After the consummation of the fraud, nothing was done to disarm plaintiff of the suspicion until the payment of interest

one year later. Under our paragraph one the fraud should have been discovered within a few weeks after the act. In law it was so discovered. If in fact the fraud had been discovered within a few weeks the payment of interest afterward would not affect the case. So, too, if the law deems that the fraud was discovered within a few weeks after the perpetration thereof, the payment of interest a year later cannot affect the case. Obviously so, because it would be an act done after the discovery of the fraud.

Time forbids me to go elaborately into all the authorities upon the question discussed in our paragraph one, or into other phases of this case, but I am convinced that the judgment should be affirmed for the reasons above assigned, if not for other reasons. I therefore dissent from the opinion of the majority.

DISSENTING OPINION.

BROWN, J.—I cannot concur in the opinion written by our learned Chief Justice in this cause.

Under all the facts in this cause, Mr. Woods, the agent of the plaintiff, might have been justified in waiving the delivery to him of an abstract of title and the opinion of attorneys thereon, in view of the certificate of Dockery & Hilbert that the title to the land was duly vested in Smith; but according to the testimony of Mr. Woods, it had always been his custom to receive a deed of trust on all loans made by the college through Dockery & Hilbert; and as no deed of trust was sent to him for this loan and he wholly failed to investigate or make any inquiry why said deed of trust was not furnished, I think his gross neglect was sufficient to set in motion the Statute of Limitations.

While Dockery held Hilbert out as his partner for the purpose of making real estate loans, it is not contended that Dockery would have loaned Hilbert \$12,000 or any other sum without a deed of trust; nor

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do I think his conduct toward the college justified the loaning of money without a deed of trust.

Mr. Woods, the agent of the plaintiff college, was a banker, and I cannot conceive of any more gross neglect of duty on the part of an intelligent agent than to loan \$12,000 for four years without security of any kind.

If the plaintiff was some person uninformed in the ordinary rules of business and trusting implicitly in the integrity and skill of an agent, the case would be quite different; but it seems that the plaintiff occasionally sent agents to Missouri to inspect the real estate upon which its loans were made, to ascertain if its money was safely invested, and how it came to loan such a large sum as \$12,000 without receiving a deed of trust, and then waited four years before trying to find out why no deed of trust was furnished, is beyond my comprehension.

As I view the matter, the plaintiff was guilty of more gross neglect than the defendant, and the loss should fall upon it.

GASCONADE COUNTY v. JOHN P. GORDON, State Auditor, and JAMES COWGILL, State Treasurer.

In Banc, March 28, 1912.

1. **MANDAMUS:** Judgment on Pleadings: Conclusions and Facts. In mandamus, where the case is put at issue by a motion for judgment on the pleadings, the facts well pleaded in the return, and not the conclusions of law pleaded in the petition or return, are the determinative matters for consideration.
2. **ROAD FUNDS:** Distribution: Motor Tax. The Act of 1911 requires the taxes arising from licenses upon motor vehicles to be placed in the "General State Road Fund."
3. **STATUTES:** Enacted at Same Session: In Parl Materia: Construction. Statutes enacted at the same session of the Legis-

lature, by the same minds acting upon the same subject, are *in pari materia*; and in such case the courts construe all the acts in such manner that each and every part thereof may stand, if such construction can be attained without doing violence to the language used in them. But if they are clearly inconsistent and repugnant, the later of the two acts prevails, and the earlier one falls.

4. ———: Stamp Act: General State Road Fund Act. The Stamp Act and the General State Road Fund Act are not repugnant and inconsistent, and both can stand, though both relate to the application of State road funds. The Stamp Act fund goes to all counties, is apportioned as school funds are, and can be used by the counties for any legitimate road purposes. The "General State Road Fund" can be used in the construction of permanent roads and for no other purpose, and the act defines such roads to be those constructed of rock and gravel, a "sandy-clay," etc., and says the plans must be approved by the county court and State Highway Engineer, and requires the fund to be distributed among the counties in proportion to the assessed valuation of properties therein. The two acts supplement each other.
5. ———: ———: ———: Legislative Interpretation. The Legislature has uniformly, by appropriation acts and otherwise, recognized that the Stamp Act Fund and the General State Road Fund are distinct funds; and the courts cannot by way of judicial legislation do what the Legislature has not done. Without further legislation the Stamp Act fund cannot be placed by the State Auditor and State Treasurer in the General State Road Fund.
6. ———: ———: General State Road Fund: Distribution. The whole of the General State Road Fund for a given year cannot be distributed among the various counties unless all have constructed the permanent roads called for by the act. The act means that no money can be distributed until (1) an approved requisition has been made by a county, and (2) then only in proportion to the assessed valuation of property in the county, and (3) in no case can a county have more than three per cent of the whole fund. All the money remaining, after the counties complying with the act have drawn out their statutory share, at the end of two years is subject to a new aggregation and distribution.

Mandamus.

WRIT DENIED.

Clarence Baxter, W. H. Barnett, and Irwin & Peters for relator.

(1) The Stamp Act fund provided by section 10229, chapter 91, Revised Statutes 1909, is now a part of the General State Road Fund provided for by article 5 of chapter 121, Revised Statutes 1909, and is to be distributed according to said Act of 1909, because said Act of 1909 providing for a general State road fund and as to how it shall be apportioned and distributed, being later in time and inconsistent with that portion of the Stamp Act passed in 1907, provided for in chapter 91, repeals that portion of said Stamp Act fund in so far as it relates to the manner of distribution. Hence the said Stamp Act fund must be brought into the general State road fund under the provisions of article 5, ch. 129, and distributed as therein provided. Sec. 11914, art. 5, ch. 121, being laws 1909, p. 768. This section is broad and all-inclusive and includes all money, however derived, for the improvement of public roads, and that part of section 10229, Revised Statutes relating to the Stamp Act fund, which provides that the same shall be distributed in like manner as State school funds are now distributed, is repealed by implication, as it is absolutely inconsistent with the latter provision relative to the general State road fund, which provides the same to be apportioned to certain counties, in proportion to the assessed valuation of properties therein. The General State Road Fund Act creates no fund; but only consolidates all other funds and directs that they shall be credited to the general State road fund and directs its method of distribution to certain counties in proportion to the assessed valuation. And as this later act is inconsistent with a prior act as to the method of distribution, this prior Stamp Act is repealed in so far as it is in conflict with the late act. 7 Words & Phrases, pp. 65 to 84; *Hingle v. State*, 24 Ind. 34; *Railroad v. Nordyke*, 27 Ind. 95; *Black on*

Interpretation of Laws, p. 118; Endlich on Interpretation of Statues, p. 308, sec. 230; *State v. Giverance*, 55 Mo. 378; *State v. Bennett*, 102 Mo. 356; *Railroad v. Cudmore*, 103 Mo. 634. (2) The entire fund must be paid to the counties that have done work or provided a fund for making road improvements, and the counties that have not provided any fund for such improvement and have in no way availed themselves of the benefit of this State Road Fund Law cannot participate in this distribuion, but can only participate in the distribution of funds arising or being on hand after they have seen fit to avail themselves of the law by appropriating funds for improving the roads in their counties. Sec. 11916, R. S. 1909. (3) A subsequent statute which is clearly repugnant to a prior one necessarily repeals the former, though it does not do so in express terms. *State ex rel. v. McDonald*, 38 Mo. 529; *Mauker v. Faulhaber*, 94 Mo. 440; *State ex rel. v. Clark*, 54 Mo. 216. Nor is it necessary that the subsequent general law should express words of repeal, as any form of exceptions showing a clear intention to repeal a special law will be sufficient. *Railroad v. Shambaugh*, 106 Mo. 557; *State v. Daley*, 49 Mo. 184; *State ex rel. v. School Board*, 131 Mo. 505; 2 *Sutherland on Stat. Const.*, sec. 443; *United States v. Freeman*, 3 How. 550; *Converse v. United States*, 21 How. 463; *State v. Clark*, 54 Mo. 216; *Bryson v. Johnson Co.*, 100 Mo. 85. A general statute will repeal a special statute where they are so inconsistent that they can not stand together. *Railroad v. Cudmore*, 103 Mo. 634; *State v. Bennett*, 102 Mo. 356; *State ex rel. v. Frazier*, 98 Mo. 426.

Elliott W. Major, Attorney-General, and *Charles G. Revelle*, Assistant Attorney-General for respondents.

(1) The Act of 1907 creating a special "Road Fund," and the act of the same session creating a "General State Road Fund," relate to separate ob-

jects and subjects and are not in conflict. *Laws* 1907, p. 373; sec 91, *R. S.* 1909; *McFarlane v. Railroad*, 175 Mo. 422; *State ex rel. v. Henderson*, 160 Mo. 208; *State v. Swaggerty*, 203 Mo. 527; *Hamilton v. Court*, 15 Mo. 20; *Court v. Griswold*, 58 Mo. 175; *Bevier v. Watson*, 113 Mo. App. 511. Between the Stamp Act, expressly creating a special fund for its incidental proceeds, and providing that each county in the State shall unconditionally and equally with all others, share the benefits thereof, and the other general act creating a general fund derived from general and certain other specific sources and limiting its benefits to certain counties and purposes, there is not, according to fundamental canons of construction, any inconsistency or conflict. (2) If there is a conflict between the general and special act, it is an approved rule of construction that if a special provision, applicable to a particular subject, be inconsistent with a general law, the special will prevail. *State v. De Bar*, 58 Mo. 395; *State v. Green*, 87 Mo. 587; *State ex rel. v. Foster*, 187 Mo. 610; *Ackerman v. Green*, 201 Mo. 244; 36 Cyc. 1151. Or otherwise expressed, the rule is that, where two provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, especially when such general and special acts or provisions are contemporaneous, the special act must be taken as intended to constitute an exception to the general act or provision. *Ruschenberg v. Railroad*, 161 Mo. 70; *State ex rel. v. Hostetter*, 137 Mo. 636; *State ex inf. v. Dabbs*, 182 Mo. 366; *Jaicks v. Merrill*, 201 Mo. 106; *State v. Bryant*, 90 Mo. 535; *Assn. v. Delano*, 108 Mo. 217; *Ex parte Neet*, 157 Mo. 533. (3) The Act of 1909 did not operate to repeal any part of the Stamp Act. If both acts can, by any reasonable construction, be construed together, both will be sustained. *Evans v. McFarland*, 186 Mo. 723; *State ex*

rel. v. Wells, 210 Mo. 620; McGrew v. Railroad, 177 Mo. 542; Manker v. Faulhaber, 94 Mo. 430; State ex rel. v. Walbridge, 119 Mo. 383. This construction is peculiarly applicable when the prior enactment is a special law and the latter a general one. State ex rel. v. Slover, 134 Mo. 19; State ex rel. v. Dabbs, 182 Mo. 359; McVey v. McVey, 51 Mo. 420; State ex rel. v. Convent, 116 Mo. 580. Furthermore, it is necessary to a repeal by implication that the objects of the two statutes be the same. If they are not, both statutes will stand, although they may refer to the same subject. 36 Cyc. 1077; State v. Shour, 196 Mo. 202; State ex rel. v. Wilder, 199 Mo. 487; State v. Clarkson, 59 Mo. 152; State v. Noland, 111 Mo. 501. These titles are of value in determining the scope and meaning of the acts themselves. State ex rel. v. Fort, 210 Mo. 527; Cytron v. Transit Co., 205 Mo. 699. It is quite clear that if the Act of 1909 had the effect of repealing that part of the Stamp Act which creates a special fund and provides its own method of distribution, it also operated to repeal, for the same reasons, the act pertaining to the Road and Canal Fund. That the Act of 1909 was not a revision of the whole subject-matter and did not repeal any part of the Stamp Act seems too clear to warrant discussion. State ex rel. v. Patterson, 207 Mo. 129. (4) By subsequent legislation the force and existence of both statutes and funds are recognized. A construction of a statute by the Legislature, as indicated by the language of subsequent enactments, is entitled to great weight. 36 Cyc. 1142, 1146; State ex rel. v. Gordon, 197 Mo. 62; Railroad v. Shacklett, 30 Mo. 557; State v. Pitts, 51 Mo. 135. State v. Bengsch, 170 Mo. 108; Laws 1911, sec. 68, p. 19; Laws 1911, sec. 26 p. 10; State ex rel. v. Gordon, 197 Mo. 62.

GRAVES, J.—The county of Gasconade, as relator, by its petition for mandamus (averring and showing a special interest in the subject-matter of the suit),

seeks to compel the State Auditor and the State treasurer to place certain funds arising from the sale of stamps under the provisions of chapter 91, Revised Statutes 1909, into what is denominated the "General State Road Fund," a fund created by section 11914 of article 5, chapter 121, Revised Statutes 1909. Said county also seeks to compel the said respondents to place in the same fund a certain other road fund which arises from licenses upon motor vehicles. Nor is relator content with these demands, but it seeks further to have these funds when thus assembled paid out only to such counties of the State as may have appropriated funds from their treasury for the permanent improvement of public roads, rather than to all the counties of the State.

Respondents concede that the motor vehicle fund should go to the "General State Road Fund," and in their return aver that it has been placed there, and that relator has received its proportionate part thereof under their construction of the provisions of article 5, chapter 121, Revised Statutes 1909. Respondents deny that the Stamp Act fund belongs to the "General State Road Fund." They also say that whilst they would be glad to pay out the motor vehicle fund, now in the "General State Road Fund," in the manner suggested in the petition of relator, yet other counties in the State are demanding their proportionate part thereof, and for that reason they ask a construction of this law by the court.

It should be noted that the relator sues for itself and some twenty-two other counties in like situation. Relator and these other counties, in the petition named, had before July 1, 1911, appropriated funds from their respective treasuries for the permanent improvement of roads under the provisions of article 5, chapter 121, Revised Statutes 1909. Petitioner had appropriated \$1000 and claims to be entitled to \$1000

from this "General State Road Fund," under the provisions of the law aforesaid.

The real contentions are two in number. First, over the disposition to be made of the Stamp Act fund, and, second, how the "General State Road Fund" should be distributed.

Both petition and return are voluminous, abounding in conclusions of law. The facts fall within small compass, and as the case stands before us upon a motion for judgment on the pleadings, the facts well pleaded in the return are the facts of the case. Under the facts respondents have not put the funds arising from the sale of stamps by virtue of the provisions of law for such sale, as found in chapter 91, Revised Statutes 1909, into the "General State Road Fund," nor have they paid out the motor vehicle fund after placing it in such "General State Road Fund" in the manner urged by relator. This sufficiently states the case for a discussion of the two or three legal questions involved.

I. The first question is, what shall be done with the money arising from the sale of stamps under the provisions of chapter 91, Revised Statutes 1909? Our statutes speak of the following road funds: (1) "Good Road Fund," Laws of 1911, p. 331, sec. 13; (2) "General State Road Fund," section 11914, chapter 121, Revised Statutes 1909; (3) "Road Fund," section 10229, chapter 91, Revised Statutes 1909, and (4) "The Road and Canal Fund," article 4, chapter 121, Revised Statutes 1909.

The first named is the motor vehicle fund, and the section of the law reads: "The registration fees provided herein shall be paid by the Secretary of State into the State Treasury, and shall be for the benefit of the 'good roads fund.'"

The second fund is thus created by section 11914, Revised Statutes 1909: There is hereby created and

established in connection with the State treasury, a fund to be known as 'the general state road fund,' and all moneys accruing to the State from any general or special levy of taxes for road purposes, or from any other source whatever, or derived in any way for the improvement or construction of public roads, shall be credited to such general State road fund."

The third is the Stamp Act, and the "road fund" therein created had its birth in this language, as *found* in sections 10229, Revised Statutes 1909: "The fund arising from the sale of the stamps provided for in section 10228 of this chapter shall, in the hands of the State Auditor, constitute a road fund; and it shall be the duty of the said Auditor to distribute said fund, annually, to the counties in the State and the city of St. Louis, in the same proportion and in like manner as the State school funds are now distributed by him."

The fourth is a fund of long standing in this State, and the language of its creation is now found in section 11906, Revised Statutes 1909, which section reads: "The money received on the account aforesaid shall constitute a separate fund, to be called the 'road and canal fund,' and shall be managed, stated and accounted for separately from the general revenues of the State."

The Act of 1911, which is the motor vehicle act, makes no specific provisions for its distribution, and whilst the style of the fund as described in the act is not just the same, it is evident to my mind that the purpose of the act was to place this fund in the "General State Road Fund," a fund having its existence since the Act of 1907. This the Auditor and Treasurer have done.

The distribution of the "General State Road Fund" is provided for by sections 11915 to 11918, Revised Statutes 1909, inclusive. These sections read;

“Sec. 11915. The money credited to the general State road fund shall be expended in the construction of permanent or continuing improvements of roads and highways in the State of Missouri, and for no other purpose whatever; and such fund shall be appropriated for use by act of the General Assembly from time to time in the manner hereinafter provided. The words ‘permanent or continuing improvements’ are hereby defined to be the surfacing of any road with gravel and rock, or with a well constructed mixture of sand and earthy material, commonly termed a ‘sand-clay road,’ any grading of the road and construction of concrete or masonry culverts, or any and all of the above defined improvements which shall be kept up without intermission. Wherever hereinafter in this article are used the terms ‘county,’ or ‘districts,’ or ‘city of St. Louis,’ the same shall be defined as any county, regular or special district, township and city of St. Louis. Plans for such improvements or construction under this article shall be approved by the county court of such county, and shall be attached to the requisition made on the State Auditor, and any and all such improvements or construction costing not less than one thousand dollars per mile of road or not less than five hundred dollars per culvert shall, in addition, be approved by the state highway engineer.

“Sec. 11916. The general State road fund shall be apportioned and distributed to the several counties and the city of St. Louis, and used therein for the purpose of aiding in the construction of the permanent improvements of the public roads therein when the several counties or districts thereof, or the city of St. Louis, or the citizens in such counties, districts or city of St. Louis, may provide the necessary funds to pay for at least one-half of the cost of such construction or permanent improvements; and in providing the necessary funds to pay for the one-half of the costs of such construction and improvements afore-

said, the citizens may pay one-fourth thereof and the counties or districts or city of St. Louis may pay the remaining one-fourth. When the citizens and county or district or city of St. Louis have provided one-half of the necessary funds for such construction and improvements as aforesaid, then the county courts or properly constituted authorities of the districts or the municipal assembly of the city of St. Louis, shall, by the proper order of ordinance, make a requisition for their proportionate share of the general State road fund each year, and shall be entitled to withdraw and receive the same in the manner herein provided on furnishing the proper evidence of the nature of the improvements proposed, and on showing that the county, district or city of St. Louis and the citizens of such county, district or city, have provided and set apart in the depository of the county, district or city of St. Louis the funds for the payment of at least one-half of the cost of such construction or improvements: Provided, the proportionate share so drawn from the general State road fund shall be used and expended for the sole purpose for which it was so drawn, and shall be used in paying the other one-half of the costs of such construction or permanent improvements or so much thereof as the proportionate part going to said county or district or city of St. Louis may discharge.

"Sec. 11917. The general State road fund shall be apportioned and distributed to the several counties, districts and the city of St. Louis in proportion to the assessed valuation of properties therein for the purpose of taxation: Provided, however, that no county, district or city shall be entitled to have or receive from such fund in any one year more than an amount equal to three per cent of the total amount belonging to the general State road fund available for use in that year. The requisition of the several counties or districts and the city of St. Louis shall be made on the

State Auditor on or before the first day of July of each year, and all parts of such fund not applied for by such requisitions of the counties, districts or the city of St. Louis shall after two years revert to and remain in the general State road fund, and be subject to future apportionment and distribution as a part of such fund. And the State Auditor shall issue the proper voucher and warrant on the State Treasurer upon being furnished with satisfactory evidence and by the orders aforesaid that not less than one-half the cost has been provided for by the county, district, city of St. Louis and the citizens of such county, district or city.

"Sec. 11918. No part of the general State road fund shall be used to pay for rights of way or for lands on which to construct such roads, nor for payment of any damages or losses to the owners of abutting property, or to any one claiming to be specially injured by reason of the location, construction or improvement of such public road for which application may be made for any of said fund."

The third is the Stamp Act fund and the statute creating the fund as above quoted, provides for its distribution.

The distribution of the "road and canal fund," is provided for by section 11908, Revised Statutes 1909, which section reads: "Until otherwise provided by law, the road and canal fund shall be equally divided annually among the several counties in this State."

The first three funds named, being all except the "road and canal fund," had their origin in three separate acts of the Legislature in 1907. The chronological history of the acts is thus stated in relator's brief:

"Automobile Law: Introduced in House January 10; passed House March 4th; reached Senate March 5th; passed Senate March 13th; signed by Governor March 19th.

“Stamp Act: Introduced in Senate January 14th; passed Senate February 11th; reached House February 12th; passed House February 22nd; signed by Governor March 8th.

“General State Road Fund: Introduced in Senate February 5th; passed Senate February 8th; reached House March 1st; passed House March 6th; signed by Governor March 30th.”

From this brief history of the origin of the funds and the law of their distribution we can intelligently discuss the question presented, i. e., should the money arising from the sale of stamps go into the “General State Road Fund?”

So far as the subject of roads is concerned these three several acts are statutes *in pari materia*. They were passed at the same term of the Legislature. There is no express repeal of one by the other. Under such circumstances what are the rules of construction?

In 36 Cyc. 1151, the general rule is thus announced: “The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date.”

SMITH, P. J., has well summarized the holdings in this State in the case of *Lang v. Calloway*, 68 Mo. App. 1. c. 396, in this language:

"It thus appears that there was passed at the same session of the Legislature two separate acts amending said section 3318 without any reference of the one to the other. The question is, what effect did the enactment of the latter have on the former?

"It is a rule of construction that where two inconsistent acts, relating to the same subject-matter, are passed during the same session of the Legislature, the last passed in the order of time, by necessary implication, repeals the first. [State ex rel. v. Heidorn, 74 Mo. 410.] While repugnant statutes must necessarily supplant previous ones, they must be clearly repugnant, for, unless the legislative intent is expressed in terms, it will not be assumed, if any other construction can be given to the subsequent act. [State ex rel. v. Draper, 47 Mo. 29.] It is a fair presumption that if the Legislature intends to repeal a statute, it will do so in express terms, or by the use of words which are equivalent to an express repeal; and the court will not, if it can be consistently avoided, adjudge that a statute is repealed by implication. [State ex rel. v. County Court, 41 Mo. 453.]

"But there is also another rule of pertinent application here which is, that where two acts are passed at the same session of the Legislature, relating to the same subject-matter, as here, they are *in pari materia*, and to arrive at the true legislative intent, they must be construed together. [Corry v. Ridge, 56 Mo. App. 615; State ex rel. v. Clark, 54 Mo. 216; State ex rel. v. Klein, 116 Mo. 259; St. Louis v. Howard, 119 Mo. 41.] The law does not favor repeals by implication. If by any fair interpretation all the sections of a statute can stand together, there is no repeal by implication."

In Black on Interpretation of Laws, in speaking of statutes *in pari materia*, it is said:

"Especially is it the rule that different legislative enactments passed upon the same day or at the same

session, and relating to the same subject, are to be read as parts of the same act."

To like effect is Lewis's Sutherland on Statutory Construction, vol. 2, page 845 (2 Ed.), whereat it is said: "It is observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended."

It is easy to see why the rule of construction pertaining to statutes *in pari materia* applies with peculiar force to statutes passed at the same session of a legislative body. In such case we have in fact the same minds acting upon the one subject. It is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is, that they had in mind the whole subject under consideration; that whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts to so construe all the acts in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts.

We take it that there can be no serious question as to these rules of construction. Under them, can these two acts (the Stamp Act and the "General State Road Fund" Act) stand as written? If they are absolutely inconsistent and repugnant, then of course the latter prevails and the former falls. But is such the case? We think not. In our judgment, both can stand. The Legislature was dealing with the question of funds to be used upon public roads. By the statute the Stamp Act fund goes to all counties in the State and is apportioned as are school moneys. Such funds may be used by the counties for all legitimate road

purposes. If the counties desired their dirt roads dragged and drained this fund could be used. If small wooden culverts are to be erected, this fund could be used. In fact it can be used for any of the purposes for which county road funds can be used. Not so with the "General State Road Fund." By statute this fund must be used "in the construction of permanent or continuing improvements . . . and for no other purpose whatever." The law does not stop here. There was fear that it might be misconstrued and the funds applied to some of the smaller things covered by the county road laws. The Legislature in the same section proceeds to define "permanent or continuing improvements." It says, "The words 'permanent or continuing improvements' are hereby defined to be the surfacing of any road with gravel and rock, or with a well constructed mixture of sand and earthy material, commonly termed a 'sandy clay road,' and grading of the road and the construction of concrete or masonry culverts, or any and all of the above defined improvements which shall be kept up without intermission." Everything is of a permanent character and must be kept up without intermission. It does not apply to the great class of road work done on many of the minor public roads in the divers counties. Later and lastly the section says the plans must be approved by the county court and by the State Highway Engineer, again showing that it has no reference to the usual and ordinary work done upon the various public roads in the different counties.

By section 11916, no part of this fund can be used by a county until the county has made provision for half of the expense of the proposed improvement. The method of distribution is different. In this law the taxable valuation of the counties is taken as a basis. Lastly no part of this fund can be used for road rights-of-way or damages to abutting property owners.

In other words, the two acts cover different fields of road work. The one was intended to aid all the counties in doing the usual and ordinary road work, and the other intended to aid in the construction of permanent and lasting improvements. The latter really supplements the former. It provides aid in a work not specially contemplated by the former. Both laws apply to the one general subject, i. e., State aid in road work, but they occupy different fields. It is not unreasonable to believe that the Legislature had in mind the granting of aid to the counties in their road work by different funds. It is not unreasonable to believe that such body thought that there should be one fund the proceeds of which could be used just as the county funds are usually used, and another and distinct fund which should be used just as the "General State Road Fund" is used. Both funds grant State aid in road work, but in different fields and phases of that work. The two statutes are not necessarily inconsistent and repugnant, and this being so, our duty is to permit both to stand. Repeals by implication are not favored by the law. If upon any reasonable ground a construction can be given which will permit both acts to stand, such must be done. Such a construction can be given in this case. The "road fund" created by the Stamp Act is one which goes to the counties to be by them used just as county road funds are used. The "General State Road Fund" act sufficiently speaks for itself as to the character of work which can be done out of that fund. Both acts can stand, and yet leave one harmonious whole as to State aid in road work.

In the above discussion we have taken the law pertaining to the "General State Road Fund" as enacted in 1909, rather than the original act of 1907. In 1909, the whole Act of 1907 was repealed, and a new act passed in lieu thereof. The first and fifth sections are just the same, but the other three sections were

made more specific in details, but they cover the exact subject-matter, so that the intent of the one act can be fully gathered from the other.

II. That the two acts were intended to create separate funds seems to have been fully recognized by the General Assembly. At the last session an appropriation was made out of such fund in this language:

“There is hereby appropriated out of any money in the State treasury, belonging to the ‘road fund’—Stamp Act—the sum of one thousand dollars, to be used by the State Auditor to purchase stamps as provided for by an act approved March 1, 1907, concerning the sale and future delivery of grain and other commodities; also, the sum of three thousand six hundred dollars, to pay the salary of a special clerk and two thousand dollars for traveling and incidental expenses in connection with enforcing said law; in all a total of six thousand six hundred dollars.” [Laws 1911, sec. 68, p. 19.]

It will be noticed that they designate it as the “road fund,” so as to distinguish it from the “general State road fund.”

At the same time and from the same fund there was an appropriation of \$500,000, to be distributed to the different counties as are the State school monies, but this act never became effective owing to a veto from the Governor.

Again House Bill No. 254, introduced by Mr. Tuggle, provided for the repeal of section 10229 and the enactment of a new section in lieu thereof. This new section provided that the Stamp Act fund should be placed in the “General State Road Fund.” This bill was reported from the committee and was duly engrossed, but was never reached on the calendar. [House Journal 1911, p 310.]

So that it is quite clear that the Legislature has throughout recognized that there were two distinct funds for separate and distinct purposes.

But in addition to this, if the contention of relator is correct the "road and canal fund" would likewise go to the "General State Road Fund," and its method of distribution be entirely changed. The Legislature has never so thought. Four years after the creation of the "General State Road Fund" we find that the Legislature treated the "road and canal fund" as it had always heretofore done. It appropriated \$15,000 therefrom to be distributed to all the counties in equal amounts. [See Laws 1911, p. 10, sec. 26.]

The legislative idea therefore confirms our views of the question. We therefore hold that the writ should be denied in so far as it is sought to compel respondents to place the funds arising from the Stamp Act in the "General State Road Fund." Let this be done in an orderly way by express legislative action. However much we may desire rock or gravel roads we can not violate the plain mandates of ordinary rules of statutory construction, and do for the State by way of judicial legislation that which the Legislature has not done, and it would seem has no intention of doing.

III. As indicated above we hold that the motor vehicle fund should go to the "General State Road Fund" because there is no specific directions for its distribution otherwise. We also hold that without further legislation the Stamp Act fund cannot be placed in the "General State Road Fund." It only remains, therefore, to ascertain just how and to what counties the "General State Road Fund" should be distributed. Respondents ask the court to apply this fund as relator contends that it should be applied, if under the peculiar provisions of the law such can be

done. The uncertainty is created by the first clause of section 11917, *supra*, but we think this is cleared up in a measure by the proviso which follows it, when taken with the preceding section.

We would be indeed glad to give this article 5 of chapter 121, the construction asked for by relator, if such were possible under the language used, but to our mind the language used is not susceptible of that construction.

To get a bird's-eye view of the situation, we shall take the two sections relating to the distribution of the funds and eliminate all portions thereof which tend to lengthen and confuse. After such elimination, section 11916 will read:

“The general State road fund shall be apportioned and distributed to the several counties . . . when the several counties . . . may provide the necessary funds to pay for at least one-half of the cost of such construction or permanent improvement; . . . when the citizens and county . . . have provided one-half of the necessary funds for such construction and improvements as aforesaid, then the county courts . . . shall, by the proper order . . . make a requisition for their proportionate share of the general state road fund each year, and shall be entitled to withdraw and receive the same in the manner herein provided on furnishing the proper evidence of the nature of the improvements proposed, and on showing that the county . . . has provided and set apart in the depository of the county . . . the funds for the payment of at least one-half of the cost of such construction or improvements.”

To this is attached a proviso which requires that the State money be used only for the payment of the remaining one-half of any proposed improvement. “or so much thereof as the proportionate part going to said county . . . may discharge.”

Section 11917, when thus culled out, would read:

"The general State road fund shall be apportioned and distributed to the several counties . . . in proportion to the assessed valuation of properties therein for the purpose of taxation: *Provided however* that no county . . . shall be entitled to have or receive from such funds in any one year more than an amount equal to three per cent of the total amount belonging to the general State road fund available for use in that year. The requisition of the several counties . . . shall be made on the State Auditor on or before the first day of July of each year, *and all parts of such fund not applied for by such requisitions of the counties . . . shall after two years revert to and remain in the general State road fund, and be subject to future apportionments and distribution as a part of such fund.* And the State Auditor shall issue the proper voucher and warrant on the State Treasurer upon being furnished with *satisfactory evidence and by the orders aforesaid*, that not less than one-half the cost *has been provided for* by the county, district, city of St. Louis and the citizens of such county, district or city."

Throughout these sections speak of counties, districts and the city of St. Louis, as well as further details, but with the exception of the last lines above we have eliminated those so as to simplify the sections. In section 11917 we have underscored some clauses which absolutely take the vitals from relator's contention to the effect that the whole fund for the given year should be divided among the counties which have made requisitions upon the Auditor, rather than among all the counties and the city of St. Louis according to the valuation of property for taxation. It must be noted that, throughout, these requisitions to participate in this fund must be based upon *proposed* improvements, and must be accompanied by evidence that the county or the citizens thereof have deposited

in the county depository one-half of such proposed improvements. These requisitions must be made on or before the first day of July each year, but "all parts of such fund not applied for by such requisitions to the counties . . . shall after two years revert to and remain in the general State road fund," etc. When we take this provision and read it along with the first clause of said section 11917, "The general State road fund shall be apportioned and distributed to the several counties, districts and the city of St. Louis in proportion to the assessed valuation of properties therein for the purpose of taxation," the legislative intent is clear. This legislative intent is (1) that no money shall actually be distributed from this fund until requisitions are made and these requisitions sustained by proper proof; (2) that the apportionment and distribution spoken of in the law is one simply upon the books of the Auditor and Treasurer and not an absolute apportionment and distribution in the sense of actually paying the money over to the counties; (3) that on the books of the Auditor and Treasurer the funds should be distributed to all the counties in proportion to their taxable valuation but in no case shall the amount distributed on the books to the city of St. Louis or to any one county exceed three per cent of the whole fund for the given year; and (4) if the city of St. Louis or any county fail to make requisition for its part of the fund, then "all parts of such fund not applied for by such requisitions of the counties, etc., shall after two years revert to and remain in the General State Road Fund, and be subject to future apportionment and distribution as a part of such fund."

The Legislature evidently thought that all of the counties would not act at once, and hence after authorizing the distribution to all, it provided for the unclaimed fund so distributed, after two years, to revert back to the original fund and be again redistribu-

ted with the accumulations. The Legislature thought that large counties and the city of St. Louis might get much of these funds and hence limited their requisitions to three per cent of the total fund available for the year. Owing to large assessed valuations, their proportionate part might be larger than three per cent of the total, and if so then it must be cut down to not exceed that amount. The fact that the Legislature provided for the unclaimed portions to revert makes it clear that the distribution in the first instance must be to all the counties and the city of St. Louis. The term districts therein used has reference to road districts in the counties, and what they receive must be from the proportionate part due the given counties.

There is no other construction of these statutes which will give full effect to all the language used therein. This is the construction which the auditor and treasurer have tentatively placed thereon, but which they ask us to obviate if we can. The language of the law will not permit us to so do. When properly studied the legislative intent becomes as plain as the light of day. The funds are to be distributed on the books to all the counties and the city of St. Louis in the manner above discussed. If certain parts are not claimed by proper requisitions from the counties, then in two years such parts revert and remain in the "General State Road Fund." The use of the words "remain in" show that it is only a book apportionment which is contemplated. In fact the whole act so shows. These views are against the contention of the relator and the other counties so situated, but they give life to the full act and must prevail.

It follows, therefore, that the peremptory writ must be denied under the law, however strong our inclinations to give relator and these other counties the relief sought. Let the writ be denied. *Valliant, C. J., Woodson, and Ferriss, JJ., concur.*

Lamm, Kennish and Brown, JJ., dissent.

THE STATE ex rel. ROBERT L. SHACKLEFORD
v. JOHN W. McELHINNEY, Judge.

In Banc, March 28, 1912.

1. **ATTORNEY: Right to Practice: Property Right.** The right of an attorney to practice law is a valuable property right, which cannot be taken from him by an arbitrary act of the court, but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense.
2. ———: ———: ———: **Arbitrary Order: Due Process of Law.** An arbitrary order of a court depriving a duly licensed attorney of his right to practice law is not due process of law, and under both the State and Federal Constitutions such order would be null and void.
3. ———: ———: **Probate Judge: Motion to Practice.** But where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof.
4. **MOTIONS: Appeals: Attorneys: Right to Practice.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom.

Mandamus.

PEREMPTORY WRIT DENIED.

J. C. Kiskaddon and A. H. Kiskaddon for relator.

(1) The admission of a person to the bar as an attorney at law is a judgment, and confers upon the person admitted valuable property rights, of which he cannot be deprived by the arbitrary action of either a court or legislature, but only upon a judicial hearing on charges presented, in which he is given an opportunity to be heard in his own defense. *Garland ex parte*, 4 Wall. (U. S.) 333; *Hefron ex parte*, 7 How. (Miss.) 127; *In re Cooper*, 22 N. Y. 81; *Fletcher v. Dangerfield*, 20 Cal. 427; *People v. Turner*, 1 Cal. 150; *Fish v. Printing Co.*, 102 Mo. App. 6; *State v. Laughlin*, 73 Mo. 443; *State v. Peabody*, 63 Mo. App. 378; *State v. Gebhardt*, 87 Mo. App. 542; *In re Flukes*, 125 Mo. 125; *McPherson v. State*, 3 W. Va. 364; *Phares v. State*, 3 W. Va. 367; *Ex parte Barr*, 9 Wheat. (U. S.) 529; *Wommack v. Halloway*, 2 Ala. 31; *Cummings v. State*, 4 Wal. (U. S.) 277; *Peyton's Appeal*, 12 Kan. 398; *Deul v. West Virginia*, 129 U. S. 114; *Ex parte Steinman*, 95 Pa. St. 220; *Ex parte Robinson*, 19 Wal. (U. S.) 505; *Ex parte Austin*, 5 Rawle (Pa.) 191. (2) Any arbitrary order of a court or act of a Legislature depriving a duly admitted attorney at law of his right to practice law is without due process of law, and under the Constitution of this State and the United States is void. It is a right of which an attorney cannot be deprived except by the judgment of a court, after an opportunity to be heard in his own defense for moral or professional delinquency. *R. S.* 1909, sec. 951; *In re Cooper*, 22 N. Y. 81; *Ex parte Garland*, 4 Wall. (U. S.) 333; *Jones v. Gore*, 142 Mo. 44; *Clark v. Mitchell*, 64 Mo. 564; *Hunt v. Searcy*, 167 Mo. 158; *State v. Julow*, 129 Mo. 174; *St. Joseph v. Truckenmueller*, 183 Mo. 9; *Ex parte Smith*, 28 Ind. 47; *State v. Loomis*, 115 Mo. 307; *Barber v. Ridge*, 169 Mo. 376; *St. Louis v. Karr*, 85 Mo. App. 608; *Williams v. Courtney*, 77 Mo. 587. (3) The act of

the Legislature in question is retroactive in that it takes away from the relator a vested right without due process of law. *Leete v. Bank*, 115 Mo. 184; *St. Louis v. Clemens*, 52 Mo. 133; *Insurance Co. v. Flynn*, 38 Mo. 483; *Lutz v. Insurance Co.*, 8 Mo. App. 363; *In re Flukes*, 157 Mo. 125; *Gladney v. Lydnor*, 172 Mo. 318; *McPherson v. State*, 3 W. Va. 564. (4) The law is void *in toto*, because it is special legislation. Constitution, art. 6, secs. 1, 35; art. 4, sec. 53, par. 32; art. 6, secs. 6, 12; R. S. 1909, sec. 3843; R. S. 1909, sec. 4063. No authority we have been able to find is exactly in point; but the principle we contend for is more or less clearly enunciated in the following: *Dunn v. Railroad*, 131 Mo. 5; *Hayes v. Mining Co.*, 227 Mo. 300; *State v. Herman*, 75 Mo. 340; *Murmane v. St. Louis*, 123 Mo. 491; *State v. Jackson Co.*, 89 Mo. 227; *State v. Messerly*, 198 Mo. 355; *Henderson v. Koenig*, 168 Mo. 356; *State v. Turner*, 210 Mo. 77; *State v. Granneman*, 132 Mo. 326; *State v. Ashbrook*, 154 Mo. 375; *Hannibal v. Telephone Co.*, 31 Mo. App. 32. (5) Where one is wrongfully deprived of his right to practice law mandamus is the proper remedy to restore him to that right. *State v. Peabody*, 63 Mo. App. 378; *Ex parte Bradley* 7 Wall. (U. S.) 364.

Henry Higginbotham for respondent.

(1) The courts cannot be required to render advisory opinions in the absence of a constitutional provision expressly imposing such duty. The judicial tribunals will decline to exercise the high office of passing upon the constitutionality of a statute unless it becomes necessary in order to determine the rights of the parties in a real and antagonistic controversy. *Black, Const. Law*, p. 84, sec. 53; *Id.* 57, sec. 25; 2 *Story on Constitution* (5 Ed.), sec. 1572; 6 *Am. & Eng. Ency. Law* (2 Ed.), 1067-1068; 8 *Cyc.* 847, note 32; *Id.* 799; *Muskrat v. United States*, 219 U. S. 346; *Opinion in 55 Mo.* 497; *In re Railroad*, 51 Mo. 586;

Opinion in 37 Mo. 135. (2) Giving advice is not a judicial act, and the pronouncement of a court in response to an *ex parte* application for advice is *coram non judice*. In the Matter of the Application of the Senate, 10 Minn. 78; Muskrat v. United States, 219 U. S. 346; Opinion in 55 Mo. 497; Matter of Railroad, 51 Mo. 586; Opinion in 37 Mo. 135; State v. Baughman, 38 Ohio St. 460. (3) Mandamus cannot be made to perform the function of an appeal, writ of error or *certiorari*. State v. Megown, 89 Mo. 156; State v. Lubke, 85 Mo. 338; State v. McKee, 150 Mo. 233; State v. Horner, 16 Mo. App. 191; State v. Field, 37 Mo. App. 83; State v. Schneider, 47 Mo. App. 669; State v. Bland, 189 Mo. 215; In re Switzer, 201 Mo. 66; State v. Walbridge, 123 Mo. 202; State v. Shelton, 154 Mo. 670. Where a party, on his own motion, has invited the action of a judicial tribunal, and that tribunal has acted, whether with or without jurisdiction, mandamus can not be invoked for the purpose of revoking such decision. State v. Young, 84 Mo. 95. (4) The question of the constitutionality of a statute will not be decided unless it is imperatively necessary to the right disposition of the case. If there is any other ground in the case on which it can be fairly and satisfactorily disposed of on the merits, the decision will be rested on that ground, and the question of constitutionality will be left open. Black, Const. Law, p. 58, sec. 27; Cooley's Prin. Const. Law (3 Ed.), 165; Cooley's Const. Lim. (7 Ed.), 231; 8 Cyc. 799; State v. Hardelein, 169 Mo. 579; McDonald v. Ass'n, 175 Mo. 250; State v. Railroad, 176 Mo. 443. (5) The creation, control and regulation of State officers is a right within the internal and exclusive policy of each State, included in the guaranty by the Federal Constitution to each of the States of a republican form of government, and in the powers declared to be reserved to the States respectively by the tenth amendment. Butler v. Penn. 51 U. S. (10 How.) 402; Taylor v. Beck-

ham, 178 U. S. 548; *Wilson v. N. C.*, 169 U. S. 586. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. . . . It may . . . restrain all engaged in any employment from any contract in the course of that employment which is against public policy. *Frisbie v. United States*, 157 U. S. 160; *Boone v. State*, 54 So. (Ala.) 109. From the State's right to regulate the conduct of its officers in whatever way may seem best to the State, it results that neither class (the attorney nor the client) is placed at a disadvantage in respect to the enjoyment of any legal right. *Boone v. State*, 54 So. (Ala.) 109. (6) Legislation which is necessary or appropriate to carry into effect a positive command of a section of the Constitution, is neither local nor special. *Kenefick v. City*, 127 Mo. 1; *State v. Etchman*, 189 Mo. 648; *State v. Darrah*, 152 Mo. 522. The act of March 27, 1911 (Laws 1911, p. 189), is clearly authorized by the Constitution. Constitution, art. 2, sec. 18; *Id.*, art. 14, sec. 7; *Manker v. Faulhaber*, 94 Mo. 430; *State v. Slover*, 113 Mo. 202; *State v. Slover*, 113 Mo. 211; *State v. Walbridge*, 119 Mo. 388; *State v. Sheppard*, 192 Mo. 506; *State v. Boyd*, 196 Mo. 65; *State v. Henderson*, 145 Iowa, 657; *People v. Nellis*, 249 Ill. 12. An act which embraces all persons who are in, or who may come into, like situations or circumstances is not special legislation. *State v. Wafford*, 121 Mo. 61; *Dunne v. Railroad*, 131 Mo. 1; *Elting v. Hickman*, 172 Mo. 237; *Ex parte Loving*, 178 Mo. 194; *Ex parte Berger*, 193 Mo. 16; *State v. Rawlings*, 134 S. W. 530. When the conditions reasonably justify the distinguishing of a class, and the law effects equally all who come within that class, that is, if all persons brought under the influence of the law are treated alike under the same conditions, such law is not special legislation forbidden by either the State or the Federal Constitution. *State v. Swagerty*, 203 Mo. 523;

State v. Darrah, 152 Mo. 535; State v. Distilling Co., 139 S. W. 453. (7) Before a statute can be denounced as invalid under the provision of the Constitution prohibiting retrospective legislation, it must impinge some existing vested right. Gibson v. Railroad, 225 Mo. 481; Bushnell v. Loomis, 234 Mo. 371.

J. C. Kiskaddon and *A. H. Kiskaddon* for relator in reply.

Relator finds a drastic law in the statutes which he believes to be unconstitutional, but with that respect for an act of the Legislature which every lawyer ought to entertain, he does not deem it wise to give it his private interpretation and defy its mandates. He has a clear right in a certain case pending in court. He asks the judicial department to pass on the constitutionality of that law, so far as it interferes with that right. There is no other tribunal to which he can go.

If one who had never been admitted to the bar, or who had been disbarred by due process of law, should present himself and ask to be recognized as an attorney at law, in a particular case, the judge would be derelict in his duty if he did not immediately refuse to allow him to assume that position. So, if, in the opinion of the judge, the act in question was constitutional, he would be false to his office if he did not prevent the commission of a crime in his court.

Here the attention of the circuit court was called to all the facts, and to the questioned act; he was asked to say that the act was invalid, but he held the contrary, and denied relator the right to appear. There was then no remedy left to relator except mandamus, in which the validity of the act is questioned.

WOODSON, J.—This is an original proceeding brought in this court, by the relator, seeking by mandamus to compel the respondent to recognize and per-

mit the former to practice law in the circuit court of St. Louis county of which the latter is the duly elected, qualified and acting judge.

The facts of the case stand uncontradicted, and are fully stated in the return, and are as follows (formal parts omitted):

“Now comes the said respondent, and for his return to the alternative writ of mandamus in the above entitled cause (hereto attached), says that said relator ought not to have writ of peremptory mandamus herein, because he says:

“It is true that the respondent is and at all times mentioned in said writ was and still is one of the judges of the circuit court of St. Louis county, Missouri, duly qualified and acting as such; that said relator, Robert L. Shackelford, is a citizen of the United States of America and of the State of Missouri, and since about the year 1879 has been admitted to the bar of said State and duly licensed to practice law, and said license has not been revoked or annulled, but is in full force and effect; and for about twelve years last past said relator has been a duly licensed, enrolled and practicing attorney at law of the said circuit court of St. Louis county, and as such is an officer of said court, and has not been and is not guilty of any contempt of said court.

“It is also true, as this respondent is informed and believes, and therefore admits, that said relator was, prior to May 1, 1910, retained as attorney at law for two defendants, Sebastian Scharer and Fred Kirchner, in a certain cause then and now pending in the division of said circuit court over which the respondent presides, as judge aforesaid, wherein Henry Goewrt et al. are plaintiffs, and Adolph Scharer, Sebastian Scharer and Fred Kirchner are defendants and said relator has not been discharged from such retainer and is now attorney at law for said two defendants, and as such attorney at law appeared in said

circuit court for said two defendants and procured orders to be made in said cause, and on the 7th day of January, 1911, filed answers in said cause for said two defendants.

“And as to whether said relator has been retained for any party, or parties in any other cause or causes pending in said court or has been or is attorney at law for any such other party or parties, the respondent says he has no knowledge or information sufficient to form a belief.

“And it is true that said relator applied to the respondent as a court, and in open court asked leave and permission, as of right, to further appear in said cause in said court as attorney for said two defendants, and to conduct their defenses in said court as their attorney at law, but only at the time and in the manner hereinafter averred and set forth, and at the same time, in said cause and in the manner and for the reasons hereinafter set forth and averred, and not otherwise, the respondent refused to permit the said relator to appear in said court as attorney at law; and it is not true that the respondent has at any other time or in any other matter, cause or proceeding refused to allow the said relator to appear in said court as attorney at law.

“And it is not true that the respondent, in so refusing to allow said relator to appear as attorney at law and conduct said defenses as aforesaid, acted wrongfully; and it is not true that the respondent has at any time wrongfully refused to permit said relator to appear in said court as an attorney at law.

“And for further return to said writ, and for cause why a writ of peremptory mandamus should not issue herein, the said respondent states: That, at the general election held in the said county of St. Louis and in the State of Missouri on the first Tuesday after the first Monday in November, 1910, the said relator, Robert L. Shackelford, was duly elected to the office

of judge of the probate court of said county of St. Louis, and thereafter was duly commissioned to said office as such probate judge by a commission issued by the Governor of the State of Missouri, in December, 1910, and duly qualified as such probate judge in December, 1910, by taking the oath of office prescribed by the Constitution of the State of Missouri, and on the 31st day of December, 1910, entered into bond, approved by the clerk of the circuit court of said county, conditioned for the faithful performance of his duties as such judge, as required by law, and on the 1st day of January, 1911, duly accepted said office of probate judge and entered upon the discharge of the duties of said office, and from said 1st day of January, 1911, said relator has continued to be and to act as such probate judge of said county and to discharge the duties of said office, and as such judge to claim and to exercise all the rights and authority, and to have and receive all the privileges, fees and emoluments of and pertaining to his said office, and is now such probate judge, and as such is discharging all the said duties and exercising all the said rights and authority, and having and receiving all the said privileges, fees and emoluments of and pertaining to his said office of probate judge of St. Louis county.

• “That, by an act of the General Assembly of the State of Missouri, entitled, ‘An act to prohibit judges of probate courts in certain counties in this State from practicing law, and providing a penalty for violation thereof,’ which was approved on the 27th day of March, 1911, it was and is provided as follows: ‘It shall be unlawful for any judge of any probate court in any county in this State, which now has or may hereafter have a population of fifty thousand inhabitants or more, to practice or act as counselor or attorney in his own name, or in the name of any other person, in any of the courts of this State, during the term of office for which he shall have been elected or

appointed. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall forfeit his right to hold such office.' That said act went into effect on the 19th day of June, 1911, and ever since said date has been and is now a law of this State.

"That the said county of St. Louis is a county of the State of Missouri, which at all times since the year 1910, has had and still has a population of more than fifty thousand inhabitants, to-wit, a population of eighty-two thousand, four hundred and seventeen inhabitants; and the said act of the General Assembly of Missouri, approved March 27, 1911, at all times since it went into effect as aforesaid, has been and is applicable to said county.

"That on the 16th day of October, 1911, the said relator, Robert L. Shackleford, filed in the said division of said circuit court over which the respondent presides as judge, in said cause in which Henry Goewrt et al. are plaintiffs and Adolph Scharer et al. are defendants, then and now pending in said division, a motion in writing, and in said motion alleged and stated his qualifications and license, enrollment and authority as an attorney at law and his retainer as attorney for Sebastian Scharer and Fred Kirchner, defendants in said cause, all as the same are hereinbefore stated and admitted; and also stated and alleged in said motion the passage by the General Assembly of the State of Missouri of said act approved March 27, 1911, and that the same went into effect on the 19th day of June, 1911; and also in said motion stated and alleged the election, commission and qualifications of said relator as judge of said probate court, and that he had entered upon the discharge of the duties of said office on the 1st day of January, 1911, and from said date had acted and was and is acting as such probate judge; and in said motion said relator averred and stated that said act of the General Assembly of Mis-

souri of 1911 is in violation of the following provisions of the Constitutions of the United States and of the State of Missouri, specified in said motion, to-wit, sections 15 and 30 of article 2, and sections 53 and 54 of article 4, of the Constitution of Missouri, and the fifth amendment and the fourteenth amendment of the Constitution of the United States; and in said motion in writing said relator moved the said circuit court, for the said reasons and on the said grounds stated in said motion, to permit said relator to appear in said motion, to permit said relator to appear in said court as attorney at law for said defendants Sebastian Scharer and Fred Kirchner and conduct their defense of said cause as attorney at law; and said motion was submitted to said circuit court in said division presided over by the respondent, and the respondent upon consideration of said motion, in the exercise of his judgment upon the same, as judge of said circuit court presiding over the same in said division, in the discharge of his duty as such judge, determined that said motion should be denied, and thereupon made and entered an order of said court in said division denying the said motion, on the 23d day of October, 1911.

"Wherefore, the said respondent prays the judgment of this honorable court, whether or not he, as judge of the circuit court as aforesaid, shall be required to do or perform any of the acts specified and required to be performed by him in and by said alternative writ; and if not, that he may be hence dismissed with his costs."

Upon the filing of the return, the relator filed a motion for judgment on the pleadings, which motion is as follows:

"Now at this day comes the relator herein and moves the court to render judgment on the pleadings herein, and to make the writ of mandamus issued herein peremptory, for the following reasons, to-wit:

“Because the return filed herein to the alternative writ of mandamus does not state facts sufficient to constitute a defense in this, to-wit:

“1. Because it appears by said return that respondent justifies his action in refusing to allow relator to practice law in his court under and by virtue of an act of the General Assembly of the State of Missouri, approved March 27, 1911, and which said act took effect June 19, 1911, which is entitled ‘An act to prohibit judges in probate courts in certain counties in this State from practicing law, and providing a penalty for the violation thereof.’

“2. That said act is in violation of the Constitution of the State of Missouri in this, to-wit:

“(a) That said act violates section 15 of article 2 of the Constitution of the State of Missouri in this, that it deprives relator of an existing vested right, and of an existing vested property right.

“(b) That said act is in violation of section 30 of article 2 of said Constitution, in that it deprives relator of liberty and property rights without due process of law.

“(c) That said act is in violation of section 53 of article 4 of said Constitution because it is a local and special law.

“(d) That said act is in violation of paragraph 32 of section 53 of article 4 of the Constitution of the State of Missouri in this, to-wit, that a general law pertaining to the practice of law by probate judges can be made applicable to all the probate judges of this State, and said act is directly and indirectly local and special.

“(e) That said act is in violation of paragraph 33 of section 53 of article 4 of said Constitution, because the General Assembly of the State of Missouri by said act indirectly enacts a local and special law by the partial repeal of a general law.

“(f) That said act is in violation of section 54 of article 4 of said Constitution, because being a local and special law it does not appear that any notice of the intention to apply therefor was published in St. Louis county, Missouri, at least thirty days prior to the introduction of the bill therefor into the General Assembly, and no such notice is recited in said act.

“3. Because said act is in violation of the fourteenth amendment of the Constitution of the United States in this, to-wit:

“(a) Because said act abridges the privileges and immunities of a citizen of the United States and deprives relator of liberty and property without due process of law, and denies to relator the equal protection of the law.”

OPINION.

Counsel for the relator state: That “the concrete questions in this case are: Can the Legislature, after one has been installed in a Constitutional office, who at the time he was installed, was a practicing attorney at law, by its mere *ipse dixit*, suspend him from that practice for a term of four years, or for any time? Is such an act of the Legislature due process of law?”

Counsel for the respondent interposes an objection to the court's authority to pass upon the question just propounded for the reason that he insists that there is no real case pending, his position being that the relator, by this proceeding, is seeking to get an advisory opinion of this court as to the constitutionality of the act of March 27, 1911, previously quoted, and not the decision of the court upon a concrete case pending.

It appears from the record that after the passage of said act relator became apprehensive that if he should continue to practice law, during the term for which he was elected judge of the probate court, he might be prosecuted under said act, and if convicted,

he would be fined and would forfeit his office as provided for by said act. Consequently he refrained from further practicing his profession, and made the request mentioned in the return, asking the respondent, as judge of the circuit court, to permit him to continue the practice of law in his court, notwithstanding the existence of the act of March 27, 1911, claiming therein that said act was unconstitutional, null and void.

Additional light is thrown upon the case, and upon the insistence of counsel for respondent, by the following extract taken from the statement of the case by counsel for the relator, viz.: "But to resume: Relator after the said act took effect did not attempt to practice in court. The unpleasant consequences of appearing in court with the prospect of a criminal prosecution, and a probable forfeiture of his office, was something not to be lightly undertaken."

If we look beneath the veiled surface of the record, the real facts of the case are, no real case was pending in the circuit court of the county of St. Louis, and for that reason, none is legally pending here. It is a moot case, pure and simple. But in this collateral and incidental manner, relator, with no case pending, is seeking the opinion of this court, as to the constitutionality of a wise remedial statute, highly penal in character.

The relator, upon the passage of the Act of March 27, 1911, not only refrained from practicing law, as thereby prohibited, but he goes further and assigns to this court his reasons for so doing, namely, that he was afraid that he might be prosecuted under said act, and if convicted he would be fined and would forfeit his right to the office of judge of the probate court of St. Louis county.

It is true, relator filed the motion, in the case before mentioned, requesting the court to permit him to continue to represent his clients therein, which motion was by the court overruled.

The right of an attorney to practice law is a valuable property right, which cannot be taken from him by an arbitrary act of the court, but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense. All the authorities so hold, among which are the following: *Garland, Ex parte*, 4 Wall. (U. S.) 333; *Heyfron, Ex parte*, 7 How. (Miss.) 127; *Cooper, Matter of*, 22 N. Y. 81; *Fletcher v. Daingerfield*, 20 Cal. 427, 430; *People v. Turner*, 1 Cal. 150, 151; *Fish v. Printing Co.*, 102 Mo. App. 6, 24; *State ex rel. v. Laughlin*, 73 Mo. 443, 447; *State ex rel. v. Peabody*, 63 Mo. App. 378, 380; *State ex rel. v. Gebhardt*, 87 Mo. App. 542; *Flukes, In re*, 157 Mo. 125, 130; *McPherson v. State*, 3 W. Va. 561; *Phares v. State*, 3 W. Va. 567; *Burr, Ex. parte*, 9 Wheat. (U. S.) 529, 530; *Wammack v. Holloway*, 2 Ala. 31, 33; *Cummings v. State*, 4 Wall. (U. S.) 277; *Peyton's Appeal*, 12 Kan. 398, 405; *Dent v. West Virginia*, 129 U. S. 114; *Steinman, Ex parte*, 95 Pa. St. 220; *Robinson, Ex parte*, 19 Wall. (U. S.) 505; *Austin's Case*, 5 Rawle (Pa.), 191.

The authorities also uniformly hold that an arbitrary order of a court depriving a duly licensed attorney at law of his right to practice law is not due process of law; and under the Federal and State constitutions, such order would be null and void. It is a valuable right which an attorney cannot be deprived of except by the judgment of a court of competent jurisdiction, after a full opportunity has been accorded him to be heard in his own defense. [R. S. 1909, sec. 951, *et seq.*; *Garland, Ex parte*, 4 Wall. (U. S.) 333; *Cooper, Matter of*, 22 N. Y. 81; *Jones v. Yore*, 142 Mo. 38, 44; *Clark v. Mitchell*, 64 Mo. 564, 572; *Hunt v. Searcy*, 167 Mo. 158, 177; *State v. Julow*, 129 Mo. 1. c. 174; *St. Joseph v. Truckenmiller*, 183 Mo. 9, 16; *Smith, Ex parte*, 28 Ind. 47; *State v. Loomis*, 115 Mo. 307, 313; *Barber Pav. Co. v. Ridge*, 169 Mo.

376; St. Louis v. Karr, 85 Mo. App. 608; Williams v. Courtney, 77 Mo. 587.] Also see cases previously cited.

Here no charges whatever were preferred against the relator, such as the law contemplates and requires, but upon the contrary, he in person came into court, and in the manner previously stated, requested the court to permit him to represent the defendants in the case before mentioned, when no such right had been denied him. In other words, a motion filed by an attorney in another case, requesting the permission to represent one or more of the parties thereto, is in no sense a proceeding to disbar him within the meaning of the authorities cited.

The charges must come from someone else having authority to act in the premises, a trial had and evidence heard. Here no trial was had and no evidence was introduced.

Clearly such conduct on the part of the relator and the court cannot be tortured into meaning that legal charges were preferred against the relator, under said Act of March 27, 1911; that relator was given an opportunity to be heard and defend against said charges; that a conviction was had; and that he had been fined and had forfeited his office under said act.

At most, conceding everything to be true, as contended for by counsel for relator, the circuit court of St. Louis county unlawfully refused to permit relator to represent the defendants in the case mentioned, and pending therein.

That act does not purport to give to the circuit court, in an *ex parte* proceeding, like the one mentioned, the right to try and disbar a probate judge from practicing law during the term for which he was elected. In fact, that act does not contemplate disbarment proceedings in any sense of the term, for any length of time, but simply provides that if any

probate judge mentioned therein shall violate its provisions, he shall be fined and forfeit the office to which he was elected; but whether in addition thereto, disbarment proceedings might be instituted against him, under the general law governing that subject, for having violated said act, is quite a different question, and is not before us for determination. But we do decide that the relator, according to this record, has not violated the act of March 27, 1911, nor been convicted for violating its terms; and that disbarment proceedings have not been instituted against him, nor has he been disbarred from practicing his chosen profession.

Moreover, motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court upon motions are not judgments of the court; they are merely orders, and not appealable from, except where authorized by express statute. [R. S. 1909, secs. 1841, 1842.]

A judgment disbarring an attorney from practicing law is final and an appeal will lie therefrom. [See cases before cited.]

We are, therefore, of the opinion, that the peremptory writ of mandamus prayed for should be denied, and that the alternative writ heretofore issued should be quashed, and it is so ordered.

All concur except *Ferriss, J.*, absent.

C. A. TILLES v. PULITZER PUBLISHING
COMPANY, Appellant.

In Banc, March 28, 1912.

1. **MAJORITY OPINION.** When the Supreme Court by a majority of its judges has spoken, its decision is the judgment of the court.
2. **JURISDICTION: Libel: Place Where Cause Accrues.** The right of a plaintiff, who resides in St. Louis, to bring a suit for libel in St. Louis county against a corporation whose domicile is also in that city, was determined by the case of *Julian v. Kansas City Star*, 209 Mo. 35; and the decision in that case, to the effect that defendant by asking for a change of venue waived the question of jurisdiction, is held to settle the question.
3. **LIBEL: Pleading: Colloquium: Connecting Plaintiff with Publication.** If the publication is libelous *per se*, there need be, under the statute, no colloquium of extraneous facts for the purpose of showing the application of the defamatory matter to the plaintiff more than that the words were spoken or published of or concerning him. That allegation having been made, the petition need not allege that the plaintiff was either owner, lessee, operator or managing officer of the corporation conducting, permitting and encouraging the bookmaking and pool selling charged to be a felony. And to charge that "these men are engaged in the commission of a felony and the owners of the race track are equally guilty with the bookmakers under the statute," is to charge a libel *per se*.
4. ———: **Owners of Corporation: Reference to Plaintiff.** The defendant on June 22nd published in its newspaper an interview with the Attorney-General in which these words were used: "These men are engaged in the commission of a felony, and the owners of the race track are equally guilty with the bookmakers under the statute"—bookmaking being then a felony. The plaintiff had then been in Europe since May 1st. The race track was owned by a corporation, in which plaintiff was a stockholder; and the property itself by two other corporations, in one of which he was a stockholder. During the year he was not in active management of either corporation, but he and two others were recognized as owners, and defendant so recognized them. Before his departure for Europe he and the other two discussed the future running of the race track, and he says the matter was left to them to do as they pleased, and he gave 241 Mo.—39

instructions before leaving to sue defendant if he was libeled by it, and the suit was brought before he saw the publication. *Held*, that the proof shows that the publication refers to plaintiff and the readers thereof so understood it, as three of them who had inside knowledge of the owners testified they so understood it.

5. ———: **Official Investigation of Notorious Crime: Privileged Occasion.** The official investigation by the Governor and Attorney-General of the persistent effort of a race track association to continue bookmaking and poolselling, which have been made a felony by recent statute, and at which 5000 people daily congregated, rises to the dignity of privileged occasion, or at least a quasi-privileged occasion; and where there is threatened legal action by them, the public is entitled to know the reason therefor. A fair publication, made as a matter of news or public concern and without actual malice, of what the Attorney-General says officially and for the public, under such circumstances—for instance, "These men are engaged in the commission of a felony and the owners of the race track are equally guilty with the bookmakers under the statute"—is privileged, and not actionable.
6. ———: **Qualified Privilege: Question for Jury.** If the publication was qualifiedly privileged and the record rebuts the idea of malice, there is no case for the jury. And though the words attributed to the Attorney-General are of themselves libelous *per se*, and though malice is presumed where the words are *per se* actionable, yet if the publication truthfully published the words used by him, who uttered them in his official capacity as information to the public, concerning a matter of great public concern, there is no question for the jury, in the absence of any showing of actual malice; and if there was no showing of express malice and none was found by the jury, although they returned a verdict for compensatory but none for punitive damages, the judgment must be reversed.
Held, by WOODSON, J., dissenting, that the court cannot declare the interview of the Attorney-General was in fact his official opinion; that whether or not it was an official opinion was a fact to be determined by the jury, upon the evidence introduced, and not by him; and that, until that fact was established, the opinion, which was oral, was not admissible in evidence.
7. ———: ———: **Malice: Proof.** For a newspaper to advocate a just taxation of the properties of a corporation of which plaintiff was a stockholder, is no evidence of malice toward him.
8. ———: ———: ———: **Enforcing the Law.** To publish what was being done by the officials of the county in the matter

of enforcing the law in reference to bookmaking and pool-selling on the race track owned by the corporation of which plaintiff was a stockholder, is no evidence of express malice towards him, or of a manager thereof.

Appeal from St. Charles Circuit Court.—*Hon. J. D. Barnett*, Judge.

REVERSED.

Judson & Green for appellant.

(1) Defendant's plea to the jurisdiction of the trial court should have been sustained. The construction placed upon the Missouri statutes by the lower court renders them unconstitutional and void in denying to the defendant the equal protection of the laws. *County v. Railroad*, 118 U. S. 394; *Railroad v. Ellis*, 165 U. S. 150; *State v. Ashbrook*, 154 Mo. 375; *State v. Railroad*, 195 Mo. 288; *State v. Loomis*, 115 Mo. 307; *Hammond Co. v. Best*, 91 Me. 431. (2) Plaintiff's petition is fatally defective in that it fails to set out enough of the article complained of to enable the court to understand the sense in which the language so set out was used, and the demurrer and motion in arrest should, therefore, have been sustained. *Townshend on Libel*, sec. 334; *Odgers on Libel* (4 Ed.), 581; *Cartwright v. Wright*, 5 B. & A. 615; *Rutherford v. Evans*, 6 Bingham, 451. There being no matters of "inducement" alleged in the petition—no allegation that plaintiff was in fact either an owner, or a stockholder, or managing officer of the corporation owner—both the petition and the proofs are in this respect fatally defective. *Havemeyer v. Fuller*, 60 How. Prac. 320; *Pub. Co. v. Journal Co.*, 108 Mo. App. 232; *Legg v. Dunleavy*, 80 Mo. 558; *Crystal v. Craig*, 80 Mo. 367; *McManus v. Jackson*, 28 Mo. 56; *Bundy v. Hart*, 46 Mo. 460; *Kenworthy v. Journal Co.*, 117 Mo. App. 327; *Flowers v. Smith*, 214 Mo. 132; *Hatfield v. Sisson*, 59 N. Y. Supp. 73. (3) It was admitted that the "owner" of the Delmar Race Track was

a corporation. As a corporation must necessarily act through its officers and agents, this article can only mean that those managing officers and agents of the corporation, who were personally in control of said track about the 22d of June, 1905, were, in the opinion of the Attorney-General, guilty of a felony. As it was admitted that plaintiff was in Europe at that time, this article could not have been libelous as to him, if he was not in fact acting as a managing officer, and defendant's demurrer to the evidence should have been sustained. *Kenworthy v. Journal Co.*, 117 Mo. App. 327; *Flowers v. Smith*, 214 Mo. 132; *Girard v. Beech*, 3 Smith (N. Y. Rep.), 337; *Newell on Slander & Libel* (2 Ed.), 258, sec. 21; *Crecelius v. Bierman*, 59 Mo. App. 513. To publish an article imputing dishonest conduct to a corporation, libels only its actual "managing officers." *Pub. Co. v. Journal Co.*, 108 Mo. App. 232. Plaintiff's case in respect to this fatal defect in his petition and proofs is not aided or strengthened in any way by the illegal testimony of *McCarty*, *Baer* and *Ray* as to what they understood the word "owners," as used in this article, to mean, because each of those witnesses had special or peculiar knowledge upon the subject, which it was not shown that the ordinary reader possessed. Therefore, the fact that the parties, with their special knowledge about the race track, understood the word "owners" to mean *Cella*, *Adler & Tilles*, affords no sort of inference that the ordinary, average reader, without such special knowledge, so understood it. The question here is, how did the ordinary reader understand it? *Gribble v. Pub. Co.*, 37 Minn. 277; *Newell on Slander & Libel* (2 Ed.), 308, sec. 33; *Callahan v. Ingram*, 122 Mo. 355; *O'Brien v. Bennett*, 76 N. Y. Supp. 498; *Snell v. Snow*, 54 Mass. 278, 13 Met. 278; *Anderson v. Hart*, 68 Iowa, 400; *Van Vetchin v. Hopkins*, 5 Johns. 211; *Stokes v. Journal*, 73 N. Y. Supp. 245. Therefore, plaintiff's instructions are fatally

defective in authorizing the jury to find for plaintiff if they believed that the article was in fact published of and concerning plaintiff, without requiring them to find that the ordinary average reader understood it to be published of and concerning plaintiff. (4) The article was not libelous even if it was understood by the ordinary reader to refer to plaintiff, because it merely states an opinion as to the legality or criminality of a certain system of betting then being openly conducted at the Delmar Race Track. Where words relate to certain acts, and merely express an opinion as to the legal effect of the acts referred to, they are not libelous, even though they in form impute a crime. Therefore, it being clear from this article that it merely expresses the opinion of the Attorney-General that a certain system of racing and betting thereon then in actual use at the Delmar Race Track was in violation of law, and that the persons who permitted the same to be so conducted had committed a crime, it was not libelous, and as there was no evidence of bad faith in making this publication, there was therefore nothing to submit to a jury. *McGilroy v. Springett*, 68 Ill. App. 276; *Ayres v. Grider*, 15 Ill. 37; *Hall v. Adkins*, 59 Mo. 144; *Hatfield v. Sisson*, 59 N. Y. Supp. 73; *Havemeyer v. Fuller*, 60 How. Prac. 316; *Townshend on Libel & Slander*, 173, 174; *Newell on Libel* (2 Ed.), 569. (5) The article was privileged because it refers to the public acts and the public opinions and announcements of the public officers of the State upon a public matter; and it was the duty of the defendant, as well as of all good citizens, to make those announcements and opinions known to those who were accustomed to attend said track. It was, therefore, in the highest degree and in every sense, a privileged occasion, and as there was no evidence of express malice or actual ill-will, there was nothing to submit to the jury. *Crane v. Waters*, 10 Fed. 689; *Weber v. Lane*, 99 Mo. App. 69; *Barrows v. Bell*, 7 Gray, 301; *Meri-*

wether v. Knapp, 120 Mo. App. 390; Brown v. Printing Co., 213 Mo. 611; 18 Am. and Eng. Ency. Law (2 Ed.), 1046; Alburt v. General Council, 232 B. Div. 400; McBee v. Fulton, 47 Md. 403; Tresca v. Maddox, 15 Am. Dec. 214; Usill v. Hales, 3 C. P. D. 319; Usher v. Severance, 20 Me. 9; Newell on Slander and Libel, p. 549, sec. 152; Pub. Co. v. Smith, 149 Fed. 706; McClure v. Pub. Co., 38 Wash. 160. (6) The Delmar Race Track was a place of general public resort, to which all the public were invited. The announcement of the Governor and the opinion of the attorney-general, therefore, as to the character of this public place, and as to the legality of the operations which were publicly conducted there, and which the general public were invited to see and participate in, was of general public interest and it was the duty of defendant as a public journal, for these reasons, to advise its readers what the opinion of the attorney-general as to its character was. The court, therefore, erred in refusing to give defendant's instructions on the theory of privilege. Finley v. Steele, 159 Mo. 299; Newell on Libel (2 Ed.), 500; Townshend on Libel (4 Ed.), sec. 209; Eames v. Whitaker, 123 Mass. 342; Landis v. Campbell, 79 Mo. 239; Press Co. v. Stewart, 119 Pa. 584; Klinck v. Kolby, 46 N. Y. 427; Klos v. Zahorik, 113 Iowa, 161; Cheny v. Leader, 114 Iowa, 298; Bearce v. Bass, 88 Me. 521; Meriwether v. Knapp, 120 Mo. App. 390; Fair Assn. v. Carmody, 151 Mo. 577; Rabb v. Trevelyan, 122 La. 174.

Bond, Marshall & Bond for respondent.

(1) An untruthful publication charging an offense "in general terms" is libelous *per se*. An untruthful publication is also libelous, though failing to charge any offense, "if it tends to expose the plaintiff to contempt, hatred, scorn, or ridicule." R. S. 1899, sec. 2259; Nelson v. Musgrave, 10 Mo. 648;

Kimball v. Sass, 12 Mo. 499; Price v. Whitley, 50 Mo. 439; Mitchell v. Bradstreet Co., 116 Mo. 241; Ferguson v. Pub. Co., 72 Mo. App. 465; Minter v. Bradstreet, 174 Mo. 485; Ukman v. Daily Record, 189 Mo. 378; McGinniss v. Knapp, 109 Mo. 131; Jones v. Murray, 167 Mo. 44. "It is not necessary in a complaint for libel to set out the whole of the obnoxious publication in which the libel appears. It will be sufficient to set forth such parts of the libel as the plaintiff relies on." 13 Ency. Pl. and Pr. 48. (2) Any publication which is libelous of itself, without any colloquium or innuendo pointing out its libelous sense and meaning, constitutes a cause of action for actual or general damages, without any evidence of injury other than proof of the publication. R. S. 1899, sec. 635; Sheber v. Wensel, 19 Mo. 513; Caruth v. Richeson, 96 Mo. 189; Crecilius v. Bierman, 59 Mo. App. 522. (3) Where oral evidence is offered to sustain an affirmative defense—as the plea in justification filed in this case—the issue joined in such defense must be submitted to the jury, even if all the evidence is one way; since it is for the jury to say whether or not they believe the witnesses. For a stronger reason must this be done, when there was no substantial evidence offered in support of a plea of justification and positive evidence was adduced in disproof of such plea. Wolff v. Campbell, 110 Mo. 114; Huston v. Tyler, 140 Mo. 252; Gregory v. Chambers, 78 Mo. 294; Dalton v. Popular Bluff, 173 Mo. 47. (4) "Where the words of the libelous publication apply equally well to more persons than one," all circumstances showing plaintiff was meant, may be given in evidence, also all statements of defendant as to the person meant; also readers of the paper may give evidence as to whom they understood the libel to refer. Fanu v. Malcolmson, 1 H. 668; Odgers on Libel & Slander, 129; Newell on Libel & Slander, 259; Caruth v. Richeson, 95 Mo. 189; Crecilius v. Bierman, 59 Mo. App. 522; Julian v. Star,

209 Mo. 79; Russell v. Kelly, 44 Cal. 641; Van Dugen v. Mail & Exp. Co., 156 N. Y. 376. A plea of justification must be as broad as the defamatory accusation, and where the defamatory charge is general in its nature, the plea must state specifically the acts or offenses of which plaintiff is guilty, or the other facts showing the truth of the charge. A mere assertion that the charge is true is not sufficient. 25 Cyc. Law & Proc., 461; Meriwether v. Knapp, 120 Mo. App. 385; Stark v. Knapp, 160 Mo. 551. (5) In general, privilege is either absolute or conditional. The utterances of members of the legislative body and proceedings in court are absolutely privileged. The right to publish judicial proceedings, or other matters, which the public are entitled to know, is conditionally privileged, and is dependent on the fairness and accuracy of the report. Two questions arise with reference to such a publication: First, is the report published fair and accurate? If so, it is *prima facie* privileged; if not, verdict for plaintiff. Second, is the report even though fair and accurate, malicious? If so, verdict for plaintiff. Odgers on Libel and Slander, 257; 18 Am. and Eng. Ency. Law, 1023. In the case at bar the libelous publication purported to be the report of oral conversation between the Attorney-General and a newspaper reporter. The record shows that the interview between the Attorney-General and the newspaper reporter was not had in the course of any official duty on the part of the Attorney-General, and that he was not correctly nor accurately quoted in the libelous publication purporting to give his remarks to the reporter. Under no view of the law can it be held that there was anything in the "occasion" of this interview to entitle it to be privileged, nor which justified the publication by appellant of a charge of felony against plaintiff as having been made by the Attorney-General to its reporter in such interview. Such a contention is repugnant both to reason and precedent. (6) Even

if the unofficial statement of the Attorney-General had been fairly and accurately reported in the libelous publication sued on, it would have been no more privileged than a report of a similar statement by any citizen. The fact that the charge that plaintiff was a felon, was made by an office holder to a newspaper reporter, gave the paper no more right to publish it than if the same charge had been made by any other citizen. This of course is true, even if the language had not been distorted and falsely reported in the article published, as the record shows was done. *Arnold v. Star*, 76 Mo. App. 159; *Brown v. Globe-Democrat*, 213 Mo. 635; *Cooley's Const. Lim.* (7 Ed.), 637; *Brown v. Knapp & Co.*, 213 Mo. 655.

GRAVES, J.—Plaintiff, a resident of the city of St. Louis, sued the defendant corporation, likewise domiciled in the city of St. Louis, for libel. The original petition was lodged with the clerk of the circuit court of St. Louis county rather than with the clerk of the circuit court of the city of St. Louis, where both parties were domiciled. Damages were alleged in the sum of \$150,000, of which \$100,000 were alleged to be actual, and \$50,000 exemplary. By the petition it is charged that the defendant publishes the *St. Louis Post-Dispatch*, a daily newspaper, and had an agent for the distribution of such paper in the county of St. Louis; that it had many subscribers to said paper in said county, and such paper was generally circulated and read in said county and was so circulated and read on June 22, 1905; that the president or chief officer of such corporation could not be found in said county of St. Louis. After these general allegations, the petition then proceeds:

“That on said date, to-wit, 22d day of June, 1905, the defendant caused the following false, malicious, defamatory and libelous articles to be printed and

published in its said newspaper of and concerning this plaintiff, to-wit:

“ ‘These men,’ he said ‘are engaged in the commission of an open felony and the owners of the race track are equally guilty with the bookmakers under the statute. The law must be enforced, and we are going to prosecute everybody who violates it.’

“Meaning thereby that plaintiff and others as the owners of a certain race track, known as the Delmar Race Track, were engaged in the commission of an open felony.

“Plaintiff states that said publication above set out was wilful, malicious and false, and by reason thereof has been damaged in his reputation in the sum of one hundred thousand dollars.”

The summons appears to have been directed to the sheriff of the city of St. Louis, and there served by delivering a copy thereof at the office of the defendant in the city of St. Louis to the person in charge of said office, the president and other chief officers of such defendant not being found even in the city of St. Louis.

At the September term of the circuit court of the county of St. Louis, the defendant entered a special appearance to challenge the jurisdiction of that court, and by its motion to dismiss did challenge the jurisdiction of that court. The motion is an elaborate one, and was evidently prepared with great care, but the details thereof need not be further stated at this time. Suffice it to now say that the same was overruled and defendant duly preserved its rights, if any, by proper bill of exceptions. After the overruling of this motion going to the jurisdiction, the defendant filed its application for a change of venue, alleging the usual statutory grounds. This application coming on for hearing and the sufficiency thereof being apparently conceded, the record discloses that the parties agreed that the court might send the case to the circuit court

of St. Charles county, and the cause was so transferred without further pleadings filed.

In the circuit court of St. Charles county the defendant challenged the petition by a demurrer, but this being overruled, it answered over. The cause went to trial upon an amended answer, which thus reads:

"Now comes defendant, the Pulitzer Publishing Company, and files this, its amended answer, to plaintiff's petition, and answering says:

"1. This defendant renews its special plea to the jurisdiction heretofore made in this court and says that this court has no jurisdiction over this defendant in this cause, for the reason that this defendant had no officer or agent in St. Louis county, where this suit was filed, nor did the cause of action sued on accrue in St. Louis county, and that the pretended service of process in this cause was made by the clerk of the St. Louis County Circuit Court sending the petition and summons to the sheriff of the city of St. Louis, and that this defendant made no voluntary appearance in the county of St. Louis, but made a special appearance for that purpose only and filed its special plea to the jurisdiction, and after said plea was overruled, removed said cause to this court by change of venue.

"This defendant says that the St. Louis Post-Dispatch is printed at its office, in the city of St. Louis, and that said paper is printed and distributed to the public in the city of St. Louis before the circulation or distribution of any copies in the county of St. Louis, and defendant says that the cause of action did not accrue in the county of St. Louis, but in the city of St. Louis, and as the circuit court of St. Louis county has no jurisdiction over this defendant, neither has the circuit court of this county.

"Defendant further says that if the statutes of Missouri are construed as warranting the service of process in this cause upon defendant, compelling it to appear in the litigation of plaintiff in the circuit court

of St. Louis county, and in the circuit court of this county, when individual publishers of newspapers can only be sued in the counties of their residence, then said statute so construed is violative of the Constitution of this State and the Constitution of the United States in depriving defendant of the equal protection of the laws.

“Wherefore, defendant asks to be hence dismissed with its costs.

“2. And defendant, further answering plaintiff’s petition, admits its incorporation, its publication of the St. Louis Post-Dispatch, the location of its principal office and place of business in the city of St. Louis, and says that its office and place of business there located is its only office and place of business; admits that the words set out in plaintiff’s petition, and alleged to have been published in the newspaper of defendant on the 22d day of June, 1905, were so printed and published, but says that said words, so alleged to have been printed and published, were an excerpt from and part of an article published in the news columns of said paper on said date and is wholly unintelligible without reference to the remainder of said article showing the connection and meaning of the words set out in the petition. The defendant denies the innuendo set out in the petition, denies that the publication was wilful, malicious and false, and denies that it was defamatory of plaintiff in any sense and denies that plaintiff has been damaged in the sum named in the petition, or in any sum whatever.

“Wherefore, defendant asks to be hence dismissed with its costs.

“3. Further answering plaintiff’s petition, defendant says that it is a corporation under the laws of Missouri, engaged in the publication of a daily newspaper, known as the St. Louis Post-Dispatch. Said paper contains news columns setting forth the current news of the day and matters of public interest. The

Delmar Jockey Club was organized as a corporation on or about January 18, 1901, for the chartered purpose, among other things, of establishing and maintaining a suitable fair grounds and a race track in the city and county of St. Louis, and engaged in pool selling, bookmaking and registering of bets on exhibitions of speed at said race track and premises, as provided by law. Said corporation became the lessee of a certain tract of land known as the Delmar Race Track, lying partly in the city of St. Louis and partly in the county of St. Louis, upon which land there was located a race track, and besides other buildings, erections and improvements, a certain shed or building known as the betting ring shed, for the purpose of having conducted therein pool selling, book making, recording and registering of bets upon contests of speed or powers of endurance between certain horses upon said race track.

“At the time of the organization of said corporation, the laws of the State of Missouri then in force authorized the issuance of licenses by the State Auditor for the selling of pools and making of bets and registering of wagers upon the contest made on a race course or fair ground, under certain restrictions contained in the statute. Under this law authorizing the licensing of bookmaking at race tracks, known as ‘Breeder’s Law,’ the Delmar Jockey Club, the lessee of the Delmar Race Track, continued the conduct of races and the registering of bets through licensed bookmakers. The spirit of gambling incited among the masses of the people resulting from this public licensed bookmaking became so prevalent and the demoralization of the public morals became so great that the public opinion of the State, guided by public teachers and preachers of all denominations, demanded the repeal of the Breeder’s Law and the prohibition of any form of bookmaking or pool selling on racing in the State. The Post-Dispatch, as a public journalist, ad-

vocated this repeal of the Breeders Law. In response to this demand of public opinion, the General Assembly of the State, against the strenuous efforts of the parties interested in the Delmar Jockey Club and Delmar Race Track, passed an act entitled, 'An Act Prohibiting Bookmaking and Pool Selling, and prescribing a penalty therefor,' which was approved by the Governor, March 21, 1905, and which became a law under the Constitution ninety days after the adjournment of the General Assembly, to-wit, June 16, 1905. Said Anti-Breeders Act is in words as follows (p. 131, Session Acts of 1905):

“ ‘Be it enacted by the General Assembly of the State of Missouri as follows:

“ ‘Section 1. That any person who keeps any room, shed, tenement, tent, booth or building, or any part thereof, within this State, and who occupies the same with any book, instrument or device, for the purpose of recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or take place within or without this State; or any person who records or registers a bet or wager or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or to take place within or without this State, or, being the owner, lessee, occupant or person in charge of any room, tenement, shed, tent, booth or building or any part thereof, within this State, knowingly permits the same to be used or occupied for any of the purposes herein set forth; or therein keeps, exhibits, uses or employs any device or apparatus for the purpose of recording such bets or wagers, or selling of pools, as hereinabove set forth, or becomes the custodian or depository for hire or privilege of any money for any purpose contrary to the provisions of this section, shall, on conviction, be adjudged guilty of a felony, and shall

be punished by imprisonment in the penitentiary for a term of not less than two or more than five years, or by imprisonment in the county jail for a term of not less than six months nor more than one year, or by a fine of not less than five hundred dollars, or by both such fine and imprisonment.

“Section 2. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.”

“After the passage of this repealing act in March, 1905, and prior to its taking effect on June 16, 1905, the management of the Delmar Jockey Club, through this plaintiff, made public announcements of their intentions to continue the running of races upon said Delmar Race Track after said law went into effect, and with a system of betting thereon designed and purposed to evade the application of said act of the General Assembly, said evasion being effected by the discontinuance of the issuance of tickets by pool sellers or bookmakers and the avoidance of any public registration or recording of bets. It was publicly stated by said management that it was their intention to contest the application of the law to such system.

“Defendant further says that after the 16th day of June, 1905, after the said law had gone into effect, the said Delmar Jockey Club continued the running of races and pools continued to be sold thereon by bookmakers who had theretofore been employed by the Delmar Jockey Club, and substantially the same system of pool selling was continued, except that the issuance of tickets to the betters and public registration of the bets was ostensibly avoided.

“The Honorable Joseph W. Folk, Governor of Missouri, announced his intention to enforce the law prohibiting the selling of pools on horse races and he caused the facts, relating to the continued operation of tracks and pool selling at the Delmar Race Track to be investigated by the Honorable Herbert S. Hadley, Attorney-General of the State, and he, the said

Governor, counseled with the said Attorney-General as to what course should be taken for the enforcement of the laws of the State against the defiant conduct of the Delmar Jockey Club and those responsible for its action.

“Owing to the large number of persons employed by the Delmar Jockey Club in attendance upon said races and in connection with the said pool selling, and the large crowds attending from the county and city of St. Louis inflamed with the passion for gambling under the facilities there afforded, there was a local public spirit developed in that section of St. Louis county hostile to the enforcement of the law. The Governor of the State had announced that he would call out the militia of the State if it was necessary for the enforcement of the law.

“The facts relating to the methods pursued in the Delmar Race Track in the matter of betting upon the horse races after the taking effect of the said act of June 16, 1905, were submitted to the said Attorney-General of the State and carefully considered by him, and he thereupon advised the Governor of the State and made public his conclusions and counsel to the effect that said methods pursued were palpably an evasion of and violative of the said act; and the Attorney-General, deeming it was a matter of public interest that his views and proposed policy in the matter of the enforcement of the law should be known to the public, gave out for publication in the defendant's newspaper, the Post-Dispatch, his conclusions, that not only were the bookmakers and pool sellers chargeable with an offense under the act, but that the owners of the property, allowing or permitting such illegal track business, were themselves equally guilty under the law, and that the offense was made a felony under the express terms of the statute. This opinion of the Attorney-General as to this construction of the act, thus given out for publication, was published in the

St. Louis Post-Dispatch, on Thursday evening, June 22, 1905, in an article giving the facts as to the declarations of the Governor of the State in the matter of the enforcement of the law and also this statement of the opinion of the Attorney-General, thus given out for publication, and being the article wherefrom the sentence, set forth in plaintiff's petition, is taken, which said article is in words as follows:

**“ ‘TROOPS AT THE TRACK SATURDAY
UNLESS GAMBLING STOPS.**

**“ ‘Governor Folk Tells Friend Militia Will be Ordered
Out at Week End to Stop Law Violation
at Delmar.**

“ ‘ASSISTANT ATTORNEY-GENERAL EXAMINES CONDITIONS.

**“ ‘State Officials to Help County Authorities, but Will
Take the Initiative if Necessary and Make
Wholesale Arrests.**

“ ‘Governor Folk told friends in St. Louis Wednesday night that militia would be sent to Delmar Track Saturday if gambling continued there at that time. He was asked what the militia could do if they were sent there. He replied that they would probably be refused admission to the track, in which event they would batter down the gates and enter.

“ ‘It was suggested that there might be some shooting in such event.

“ ‘“Oh, no,” replied the Governor, “not unless the other people shoot first.”

“ ‘He said the soldiers would arrest everybody found in the place if it should become necessary to send them there.

“ ‘The Governor is spending Thursday in Covington, Ky., and will return to St. Louis at night.

“ ‘As a result of the conference between Governor Folk and Attorney-General Hadley, John Kennish, one of Mr. Hadley’s assistants, will go to St. Louis county Thursday to personally represent the State.

“ ‘He has instructions to request Sheriff Herpel to swear in a sufficient number of deputies to arrest every bookmaker and proprietor in Delmar, and to continue to make the arrests as long as there is any gambling at the track or on the premises.

“ ‘It is expected that Mr. Kennish will also make a personal investigation of the violations of the Sunday closing laws by the saloons in St. Louis county and make a full report to the Governor, through the Attorney-General.

“ ‘Mr. Hadley says that the State officers are prepared to co-operate to the fullest extent with the county officials in the establishment and maintenance of obedience of the law; but if the county officials fail to do what is expected of them the State will not hesitate to take the initiative.

“ ‘He said Mr. Kennish had the option of ordering the arrest, by the county officials, of bookmakers and proprietors at the track. His action in the matter was left to his discretion.

“ ‘“These men,” he said, “are engaged in the commission of an open felony, and the owners of the race track are equally guilty with the bookmakers under the statute. The law must be enforced, and we are going to prosecute anybody who violates it.”

“ ‘Mr. Hadley received Thursday a formal order from Governor Folk to proceed, in person or by one of his assistants, to St. Louis county to assist the prosecuting attorney in prosecuting and suppressing violations of pool selling and dramshop laws, and to do what was necessary in instructing the prosecutor and sheriff to bring about the result.’

“Defendant says that all the facts stated in said article were true. It is true that the Governor of the State expressed himself in the interview as set forth in said article; that a conference had been had between the Governor and Attorney-General, and that Mr. Kenish, the assistant of the Attorney-General, had been instructed as therein set forth, and that the words complained of in the petition were official statements of the Attorney-General of the State as to what he proposed to do in the enforcement of the law under the instruction from the Governor of the State.

“Defendant says that under the Act of March 21, 1905, bookmaking or pool selling or registering or recording bets upon horse races, or the knowingly permitting property to be used for such purposes by the owners thereof, is declared to be a felony, and the validity and constitutionality of such enactments has since that time been adjudged by the Supreme Court of the State.

“Defendant further says that it was a matter of great public interest affecting the general public, who were invited to patronize the said race track, that the position and intention of the public authorities of the State, including the Attorney-General of the State, with reference to the legality of the business carried on at said race track after the repeal of the Breeders' Law, should be publicly known. Wherefore, defendant says that the said article was highly privileged and that it was the right and duty of the defendant to publish the same; that it was published in good faith, without any malice toward plaintiff or any one, and was not defamatory in any sense and that it was published solely for the purpose of informing the public as to matters in which the public was immediately interested.

“Wherefore, having fully answered, defendant asks to be hence discharged.

“Further answering, defendant says that, irrespective of the privileged character of the said publication, the words set out in the petition and complained of were not defamatory in any sense; that the statement made by the Attorney-General, as published in the defendant’s paper, did not accuse the owners of said race track, or any of them, of being felons, but, on the contrary, it merely stated that the acts, which those in charge of the management of said race track were publicly permitting and encouraging on said race track, were violative of the statute, and that they, the said managers, in permitting and encouraging such acts, were themselves violating the statute and subjecting themselves to its penalties, and that the word ‘felony’ was only used as descriptive of the offense thus committed in the words of the statute, and was only the legal opinion of the Attorney-General as to the legal effect of the business openly conducted with the approval of those in charge of said race track.

“Wherefore, defendant says that the innuendo in said petition is untrue in fact and unfounded in law and that the said article was not defamatory in any sense of plaintiff, and defendant asks to be hence dismissed.

“4. Defendant further answering says that it is true that after the taking effect of the act known as the repeal of the Breeders’ Law, the managers of the Delmar Jockey Club, who were the owners referred to in the said article complained of, did at the Delmar Race Track adopt a scheme for the operation of horse racing, with betting thereon, in the attempted evasion of the said act of the General Assembly prohibiting bookmaking and pool selling; that said scheme of attempted evasion of said act consisted in dispensing with the issue of tickets by the bookmakers to the parties making bets, and in the adopting of a system of identification of the betting parties by numbers on badges given to all parties entering the race track, and through a system of recording the bets by ciphers,

letters or marks on slips or sheets used for that purpose by the bookmakers or their clerks. Defendant says that this system was violative of the spirit and letter of the act prohibiting bookmaking and pool selling, and that under said act for the owner or lessee of a race track to knowingly permit the premises to be used for such purposes, was declared a felony.

"Defendant further says that the lessee operating the Delmar Race Track was a corporation, the Delmar Jockey Club, and that the managers of said corporation who knowingly permitted such violation of the law were amenable to its penalties. That this system of evasion and violation of said act was openly carried on on said race track after the repeal of the Breeders' Law, by this plaintiff as one of managing officers of said corporation.

"Wherefore, defendant says that the statement of the Attorney-General which was published in said paper of defendant and is complained of in the petition, was true."

The reply denied the several defenses in the answer contained. The trial resulted in favor of the plaintiff and a jury returned a verdict in his favor for \$25,000, as compensatory damages. No punitive damages were awarded.

Of this verdict, so far as the record shows, the plaintiff voluntarily remitted the sum of \$12,500, and judgment was rendered against the defendant for the remainder, i. e., \$12,500.

Motions for new trial and in arrest of judgment proving unsuccessful, the defendant in due form and time appealed to this court. Points made will be noted in the course of the opinion.

I. The first point made in the brief for appellant is the one going to the action of the circuit court in disallowing its plea to the jurisdiction. Several authorities are cited in support of the proposition. The

original motion going to the jurisdiction is elaborate, and well and carefully worded. Special appearance is preserved in the motion. At all times thereafter the defendant undertook to assert the want of jurisdiction. The question was preserved in the answer after the overruling of the motion. This question, however, has been so recently gone over by this court in the case of *Julian v. Kansas City Star*, 209 Mo. 35, that it would be useless to rediscuss the question here. The individual views of the writer and of LAMM, J., are expressed in the dissenting opinion in the Julian case. Those views, however, are not the views of the court. The principal majority opinion in the Julian case, as well as the minority opinion, left a fair Federal question, which Federal question is again urged here. By a separate concurring opinion in the Julian case, a State question, finally determining the case, was injected. That question was the waiver of jurisdiction over the person by reason of filing an application for change of venue. Upon this particular question, our court stood four to three. It was a State question, and operated to obviate a discussion of the real question discussed in the Julian case, when such case reached the Supreme Court of the United States. What that court may have thought of the real issue in the Julian case, must, by reason of the injection of this State question in that opinion, remain as a sealed book. [30 Sup. Court Rep., p. 406.]

A reading of the memoranda opinion by the United States Court, *supra*, shows that a discussion of the real question in the Julian case, and the real question of jurisdiction urged in this case, was obviated by the State question aforesaid, discussed in the concurring opinion in the Julian case. The same question of waiver is in the case at bar. The United States Supreme Court has decided that this State question is sufficient to preclude that court from a review of the Federal question. The position of this court on the

question of waiver is fixed in the Julian case, so that with these opinions nothing is now left for defendant as to this contention, whatever may be the view of the individual judges. When the court, by majority, has spoken, such is the judgment of the court. This point is therefore ruled against defendant.

II. The second contention of the defendant is that the petition is fatally defective in that it fails to set out enough of the article complained of to enable the court to understand the sense in which the language set out was used. We have set out the whole of that part of the petition bearing upon this point in the statement. Plaintiff says his petition is sufficient under section 635, Revised Statutes 1899 (now Sec. 1837, R. S. 1909). This section reads:

“In an action for libel or slander it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary.”

Defendant couches his objection to the petition in this language: “It contains no introductory averments of any matters of fact showing plaintiff’s relation to the Delmar Race Track; that is, it contains no allegation that he was either an owner, a lessee, an operator or managing officer of the corporation owning the race track, or that he was a stockholder in the corporation owner. There being, therefore, no preliminary matter of inducement pleaded in the case, and, the language set out in the petition containing no direct reference to plaintiff, by name or otherwise, the innuendo which plaintiff has included in his petition

for the purpose of applying the alleged libelous language to the plaintiff is insufficient for that purpose.”

We are not impressed with this contention in view of the statute, *supra*. In the language of the statute it is not “necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose.” In other words there need be no colloquium of extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff more than that the words were spoken or published of and concerning him.

In the early case of *Curry v. Collins*, 37 Mo. l. c. 328, this court said: “Since the statute (R. S. 1855, p. 1240, sec. 55) there need be no colloquium of extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff, more than that the words were spoken of and concerning him. [*Stieber v. Wensel*, 19 Mo. 513.] And when the slanderous words are actionable in themselves, it is not necessary to make any prefatory averments as to the circumstances to which they refer; but if the words do not *per se* convey the meaning which the plaintiff would assign to them, the petition must contain a statement of the extrinsic matter necessary to show that they are actionable, and what is necessary to be stated must be proved.”

The words charged to have been published in this case are actionable *per se*. To whomsoever they referred, they charged such party with being guilty of a felony, an indictable offense. Under our statute it was not necessary to aver that the plaintiff was owner or manager of the Delmar Race Track, and thus identify him as the party referred to in the language quoted. It is sufficient to aver that the language published “was published . . . concerning the plaintiff.” It thus became necessary for the plaintiff to show by competent evidence that the language “was

published . . . concerning the plaintiff." This statute materially changed the verbiage of pleadings in libel and slander cases, and was expressly passed for that purpose. If the words were not actionable *per se* then the rule as to pleading extrinsic matter might be different. [Legg v. Dunleavy, 80 Mo. l. c. 563.]

The question of proof should not be intermingled with the question of pleading. The point here made attacks the pleading only. As to this point, we think the contention of defendant is not well taken and it is therefore so ruled.

III. Defendant further urges that the proof fails to show that the plaintiff was libeled, even though it be conceded that the article was libelous, and not privileged. This contention is based upon the admitted facts that the real owner of the Delmar Race Track was a corporation, and that the defendant although a stockholder in the corporation was not in the active management thereof at the time of the publication. The situation was this: The race track was run by the Delmar Jockey Club as lessee. In this corporation, plaintiff was a stockholder. The property itself was owned by two other corporations. Plaintiff, Tilles, was interested in one of these corporations, but not in the other. During the year 1905, he was not actively managing the Delmar Jockey Club. May 1, 1905, he left for Europe and remained there some six months. At the date of the publication he was in Europe and of course was not in the personal active management of the corporation which conducted the race track mentioned in the pleadings.

Arraying these facts, the defendant charges that there has been a failure of proof in this case, and its demurrer to the evidence ought to have been sustained. The contention is concisely couched in this language: "It was admitted that the 'owner' of the Delmar Race Track was a corporation. As a corporation must nec-

essarily act through its officers and agents, this article can only mean that those managing officers and agents of the corporation, who were personally in control of said track about the 22d day of June, 1905, were, in the opinion of the Attorney-General, guilty of a felony. As it was admitted that plaintiff was in Europe at that time, this article could not have been libelous as to him, if he was not in fact acting as a managing officer, and defendant's demurrer to the evidence should have been sustained."

Another bit of testimony should be mentioned. Plaintiff says that before leaving for Europe, and after the passage of the law which repealed the Breeders' Act, mentioned in the pleadings, he and his copartners, Adler and Cella, had discussed the matter as to the further running of the race track. He further says that the matter was left to them to do as they pleased. In fact, the general tenor of plaintiff's evidence discloses that he was not actively managing the business of the corporation lessee of the race track. On the other hand it shows that he had but little to do with it during the year 1905 up to May 1st, and nothing to do with it from that time or until long after the publication of the article involved in this controversy. About the only thing left behind him at the time of his departure, in which he seems to have retained an active interest, was the bringing of a libel suit against defendant, for he says he left instructions to sue defendant if he was libeled by it, during his absence, and the suit in this case was filed before plaintiff had seen a copy of the paper, or even heard of the alleged libel. A friend, also in Europe, showed him a copy some days after the suit was filed. His alleged injured feelings were therefore an afterbirth. To sustain the issues upon his part, the plaintiff by the examination and cross-examination of three witnesses undertook to prove that they understood the word "owners" as used in the article to mean Cella,

Adler and Tilles. (These witnesses possessed special information. That is, they were possessed of information not possessed by the general public or by the general reader, and for that reason were more readily able to say that they understood the article to refer to Cella, Adler and Tilles. There is but little evidence tending to show that the general reader did so understand the word "owner.") Upon these facts the questions arise, does the proof show that (1) the article in fact referred to Tilles, who was not in the active management of the business, and (2) did the readers of this paper so understand that it did so refer.

Whilst it is true plaintiff, Tilles, was not actively engaged in the management of the corporation at the time, yet we think that in law he was a co-manager, even under the talk had with his copartners just prior to his departure for Europe. The defendant paper had upon numerous occasions published that Cella, Adler and Tilles were the owners of this race track, and as a matter of fact they owned practically all of the stock in the Delmar Jockey Club. We think that as such manager he was included within the term "owners." Especially is this true in view of the fact that the defendant had continuously recognized him as an owner. By this we do not mean that every stockholder of a corporation could sue when a newspaper said that the owners were guilty of a felony. There is a broad distinction between a mere stockholder and a managing officer. We are further impressed that, taking all the evidence together, it tends to show that the general reader would understand that the word "owners" referred to Cella, Adler and Tilles, and therefore to the plaintiff as one of such firm. This point we rule against the defendant.

IV. Defendant contends that the matter published is privileged. It is urged that action was being taken by both the executive and legal departments of the

State against the conduct of the Delmar Jockey Club. That the whole matter was of extreme public interest and for that reason the defendant was justified in publishing what the Governor and Attorney-General said about the situation. To our mind there is much substance in this contention. The law under which the plaintiff and others, through the corporate entity of the Delmar Jockey Club, had been acting, had been repealed. Its repeal was effective June 16, 1905. It would seem that the Delmar Jockey Club was loath to give up the privileges and emoluments theretofore enjoyed. The situation had become so acute that the the Governor of the State had publicly indicated that the militia of the State would be used to suppress gambling, if such existed at the Delmar Race Track. Not only so, but the Governor had called upon the Attorney-General and held conference with him as to the enforcement of the law. It was upon an occasion of this kind that the article was published. The article truthfully represents the expression of the Governor and also the expressions of the Attorney-General. Some quibble is made that the language quoted from Attorney-General Hadley is not his language, but the evidence shows that it is substantially reported as by that official stated. The evidence discloses that the place at the race track would accommodate five thousand or more people and that it was generally filled. These visitors no doubt were from all parts of the State, as well as from other States.

The Governor of the State had investigated the facts and the Attorney-General and his assistant had likewise investigated the same. Conferences between these officials were being held, and contemplated action was pending. The public press had been for some time discussing conditions at Delmar Race Track. If the law was being violated, and gambling permitted, the public had an interest in knowing the facts. If contemplated action of any kind affecting this place

of public amusement was about to be taken the public was entitled to know of such contemplated action. The whole situation is so well described by Attorney-General Hadley in his testimony in this case, that at the expense of length to the opinion we quote much of his evidence. He said:

“Q. General Hadley, you are familiar, I suppose, with the act of the General Assembly known as the Anti-Breeders Law, prohibiting bookmaking and prescribing a penalty therefor, reported in the statutes, approved March 21, 1905, and reported on page 131 of the Session Acts of 1905? A. I am.

“Q. You personally prepared that act, did you not? A. Well, I helped certain members of the Legislature to put the bill in the form in which it was finally enacted, and advised with them as to the form in which it should be drafted.

“Q. Were you consulted by the Honorable Joseph W. Folk, Governor of Missouri, after this act took effect in June, 1905, as to the reported violations of that act? A. Yes, sir.

“Q. Was Mr. Kennish connected with that conference and with any proceedings resulting therefrom? A. Yes, sir; that is my recollection that he was both present at the conference, and also acted in his official capacity in reference to the investigation of alleged violations for the purpose of instituting and assisting in prosecutions.

“Q. Now, was any report of the condition under which racing and betting were conducted at the Delmar Race Track submitted to yourself and Governor Folk?

“Q. I ask you as to the fact whether such reports were submitted? A. I was advised and from what was said I would judge that Governor Folk was advised of the conditions by newspaper reports, and, also, in my case by personal conversation with those who said they had been present at the Delmar Race Track

and had seen the method in which bookmaking was carried on.

“Q. Were you advised of the fact that the delivery of tickets to the parties making bets had been discontinued? A. Yes, sir: I had informed myself as to the method in which the bookmaking, or alleged bookmaking, was being conducted.

“Q. Did you give any opinion to the Governor of the State in the matter, in response to a request from him for your opinion? A. I do not now recall whether I gave any written opinion to Governor Folk. I distinctly recollect having expressed to him an opinion in our several conferences, as to what I thought was the illegality of the methods adopted.

“Q. I now call your attention to an interview reported in the St. Louis Post-Dispatch, the paper of Thursday evening, June 22, 1905, do you recall any interview with a Post-Dispatch reporter about or prior to that date? A. Why, I recall that I had a number of interviews with different reporters for the Post-Dispatch and other St. Louis papers during that period in which this matter was being actively considered and handled by the State authorities and the county authorities. As to the interview in question, I also recall a conversation with a party who said he was a reporter for the Post-Dispatch in reference to it, in reference to the matter.

“Q. Do you remember who the reporter was? A. I do not; my recollection is that I had never seen him before.

“Q. You don't remember whether it was Mr. McAuliffe, the gentleman here? A. My recollection is that it was not Mr. McAuliffe.

“Q. I call your attention to this statement in the article, preceding the reported interview with yourself: ‘As a result of a conference between Governor Folk and Attorney-General Hadley, John Kennish, one of Mr. Hadley's assistants, will go to St. Louis

county Thursday to personally represent the State. He has instructions to request Sheriff Herpel to swear in a sufficient number of deputies to arrest every book-maker and proprietor in Delmar, and to continue making the arrests as long as there is any gambling at the track or on the premises. It is expected that Mr. Kennish will also make a personal investigation of the violations of the Sunday closing law by the saloons in St. Louis county, and make a full report to the Governor through the Attorney-General.' Now, are the facts stated therein as to the instructions to Mr. Kennish as a result of the conference between Governor Folk and yourself and Mr. Kennish, correct? A. I think some of that which you read to me would be inferences or conclusions of the writer of the article and others would be a correct statement of fact. Mr. Kennish was directed to go to St. Louis county and confer with the authorities there, and to ascertain what was in reality being done and to report. That, my recollection is, was the only purpose of his visit upon the first occasion, and the reason why he went there. But he did go there at my direction, at the request of the Governor, to ascertain what was being done, with the idea of taking action upon it; and I wish to say in that connection, as explanatory, that I was here in St. Louis at the time taking testimony before Judge Anthony in the Standard Oil case, and I was the only one that was entirely familiar with the testimony to be introduced. Mr. Kennish went in place of myself.

"Q. Did Mr. Kennish go personally to the Delmar Race Track? A. My recollection is that he did not, although I may be mistaken in that.

"Q. How did he investigate it? Whether he ever went to the race track, I do not know; he went to St. Louis county on several occasions for the purposes that I have stated.

"Q. Did you instruct him to go there to participate in the prosecution of parties who were arrested

and prosecuted for violation of the Anti-Breeders Law? A. Both Mr. Kennish and myself went subsequently to assist in the trial of the accused men on the charge of bookmaking.

“Q. Now I will call your attention to a reported interview with yourself, which I will read to you:

“ ‘Mr Hadley says that the State officers are prepared to co-operate to the fullest extent with the county officers in the establishment and maintenance of obedience to the law; but if the county officials fail to do what is expected of them the State will not hesitate to take the initiative.

“ ‘He says that Mr. Kennish had the option of ordering the arrest, by county officials, of bookmakers and proprietors at the track. His action in the matter was left to his discretion.

“ ‘“These men,” he said’—that is, referring to you—“are engaged in the commission of an open felony, and the owners of the race track are equally guilty with the bookmakers under the statute. The law must be enforced, and we are going to prosecute every-body who violates it.”’

“Now, calling your attention to the words— you have already stated you did have a conversation with the reporter for the paper about that? A. Yes, sir.

“Q. About that time when the subject was discussed? A. Yes, sir.

“Q. I call your attention particularly to this language: “ ‘These men” he said, “are engaged in the commission of an open felony, and the owners of the race track are equally guilty with the bookmakers under the statute.”’ To that specific language quoted; did you or did you not use that language to the reporter? A. I do not know that I used those specific words; my recollection would be that I did not use those specific words, *but I said in substance what I am quoted as saying.*

“Q. I call your attention particularly to the statement that ‘these men are engaged in the commission of an open felony;’ state whether or not you used those words? A. I think I did not use the word ‘open;’ I think I used the words ‘they are committing a felony.’ The words ‘open felony’ would not be a legal term, and consequently I think I did not use it, but I think I did make a statement to the reporter in answer to an inquiry from him as to the criminal responsibility of the owners of the track who were permitting bookmaking to be done there, and in answer to such an inquiry I said that they were equally guilty with those who were doing the bookmaking, and made guilty by the same act.

“Q. That statement was made by you for publication, was it not? A. It was made in answer to the inquiry, and I understood of course that what I said to him would be embodied in a newspaper article, or would be stated as an interview. Of course, I did not mean to say that I sought the interview and desired to make any statement. I recollect the reporter coming to me and asking me some questions which called for a statement for my opinion as to the criminal responsibility of the various parties concerned in the bookmaking, and I gave him what was my opinion.

“Q. *Now this opinion was given by you for publication, after you had examined the act?* A. Oh, yes.

“Q. *And after you had had those conferences with the Governor of the State?* A. That would be my recollection, although I will say that I had several conferences with the Governor, both before I came to St. Louis and after I came here; and he was here on one or two occasions. Whether it followed the conference here in St. Louis or not, would be a question on which my recollection would not be sufficiently clear to make a statement that I would be satisfied with.

. . . "Q. Now General Hadley, in making this statement to the reporter of your opinion as to the legal responsibility of all the parties concerned in what you found was a violation of that statute, did or did you not deem that it was a matter of public interest and to so state it, that it was your duty to have and to give an opinion to the public? A. I had an occasion to form an opinion in this matter in order to advise the Governor of the State in my official capacity, and I answered the inquiry of the reporter because I believed in this instance, and in other cases, that it was of interest to the public what was being done by the public officials, and that the public has within reasonable limits the right to know about it.

"Q. You felt that this was a case in which the public had an interest in knowing your opinion about the matter? A. I had assumed so from the prominence given it in the news columns of the local papers, and from the fact that I was asked as to my opinion by a representative of the papers, by representatives of the papers."

• Under the law it is the duty of the State's Chief Executive to see that the laws of the State are enforced. To this end he has the right to call upon the chief law officer of the State. Both have the right to investigate the facts, and both have, in their respective spheres, the right to act. Under the evidence in this case there had been an official investigation. Such investigation rises to the dignity of a privileged occasion, or at least a quasi-privileged occasion. There was threatened action upon the part of the Chief Executive and the chief law officer of the State. And all this, too, after an investigation. The reason for such threatened action the public was entitled to know, to the end that those who did not desire to be present when wholesale arrests were made, or the militia was called into service might keep away from the place. The Attorney-General in the close of his testimony

said that he was speaking officially and intended that his opinion should be made public, on account of the public interest which was to be subserved. He was in fact expressing his opinion as to the condition and legal status of the Delmar Jockey Club and the acts of such club and its owners.

Under these circumstances, we think that there was a privilege or at least a qualified privilege in the publication of the article containing this opinion of the chief law officer of the State. Of course, such publication would have to be fair and without malice. As said by COCKBURN, C. J., in *Watson v. Walters*, L. R. 4 Queen's Bench, l. c. 86:

"It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

"The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice is meant, while by legal malice, as explained by BAYLEY, J., in *Bromage v. Prosser*, 4 B. & C. 255 (E. C. L. R., vol. 10), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord CAMPBELL, C. J., in the case of *Taylor v. Hawkins*, 16 Q. B. 321 (E. C. L. R., vol. 71), 20 L. J.

Q. B. 314, 'is that, if the occasion be such that repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.'

"It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

"The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by LAWRENCE, J., in *Rex v. Wright*, 8 T. R. 298, namely, that though the publication of such proceedings may be to the disadvantage to the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davison v. Duncan*,

7 E. & B. 231 (E. C. L. R., vol. 90), 26 L. J. Q. B. 106, Lord CAMPBELL says: 'A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity.' And WIGHTMAN, J., says: 'The only foundation of the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great.'

"Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. *The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned.* There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with LAWRENCE, J., in *Rex v. Wright*, 8 T. R. 298, that the same reasons which apply to the reports of proceedings in courts of justice apply also to proceedings in Parliament."

One of our courts has extended the privilege to the acts, and the reasons for the acts, of important public officials. In *Bank v. Goodwin*, 148 Mo. App. l. c. 374, GOODE, J., says:

"It is urged for defendants the words charged cannot be regarded as a libel, because they were the statements of a reason, whether a statutory one or not, why the Postmaster General issued a fraud order against plaintiff. On the face of the petition it is ambiguous whether the publication intended to say the

Postmaster General had assigned such a reason for his order, or the defendants were undertaking to explain the issue of the order by imputing reasons to the Postmaster General. If that official gave no such reason, then defendants are liable unless they can prove the truth of the charge. The question of difficulty is whether or not, if the Postmaster General did assign the published matter as a reason for his action, this clothes said matter with a quasi-privilege, so defendants are not liable unless they published from express malice. Authorities on this question are meager and perhaps not harmonious. The Postmaster General is a high official of the National Government and his acts are such as are of interest to the general public. We simply say that in our judgment a fair publication, made as matter of news or public concern and without actual malice, of what such an officer does officially and the reasons he gives for his acts, should be privileged, and we hold it is upon persuasive authorities, though we find none on either side of the question in this State. [McClure v. Pub. Co., 38 Wash. 160; Meteye v. Times-Democrat Publishing Company, 47 La. 824; Wason v. Walter, L. R. 4 Q. B. 73; Conner v. Publishing Co., 183 Mass. 475; 25 Cyc. 410, and cases cited in notes.] In said treatise the rule is thus stated: 'An accurate and impartial account of executive or legislative proceedings and investigations is privileged when made in good faith.' That ought to be the law, considering the widely diffused interest among the people in what great officers of the government do in their official capacity, and the beneficial influence on the conduct of public affairs of disseminating information on the subject. We do not see why the public is not entitled to be informed the Postmaster General has issued a fraud order against some persons or company and of the reasons assigned for doing so, but think no one will be harmed and many perhaps helped, on the whole, by publishing the facts."

The cases cited by Judge Goode fully sustain the views expressed by him.

The next question is, was there malice shown in the publication of the article?

Primarily where the words used are actionable *per se* malice is presumed, but this, like all other presumptions which take the place of evidence, is a rebuttable presumption, and the presumption may be conclusively destroyed by the facts and circumstances. In the case at bar the jury in effect found that there was no express malice. The jury refused to find punitive damages, thus indicating that the jury was satisfied that there was no evidence of express malice. All the facts tend to show that this article was published in good faith as a matter of public concern, and it was a matter of great public concern.

Practically all the evidence shows that there was no malice towards this plaintiff in the publication of the article. The plaintiff in an effort to show express malice introduced certain previous publications from defendant's paper. Even though from the words taken alone there was raised the presumption, presumptions of this class disappear upon appearance of evidence.

If the article was qualifiedly privileged and if the record rebut the idea of malice then there was no case for the jury. The Court in Banc has but recently so announced. In *Diener v. Star Chronicle Pub. Co.*, 230 Mo. l. c. 621, we said:

“So, if the petition be not challenged by way of demurrer *in limine*, and the case be fully developed on trial, and if under the pleadings and evidence no case is made, the court may take the case from the jury by a peremptory instruction in the nature of a demurrer. So far as above indicated, libel suits, though *sui generis* (in a sense) are subject to those rules of practice found wise and useful in administering justice generally in the courts.

“The propositions just ruled lie well within the holding and reasoning of *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205; *Ukman v. Daily Record Co.*, 189 Mo. l. c. 390, and the fourth proposition discussed in the *Ukman* case, 189 Mo. l. c. 393, *et seq.*, and cases and textbooks cited; *Branch v. Knapp & Co.*, 222 Mo. 587-588; *Banks v. Henty*, L. R. 7 App. Cas. (H. L.) 741. And the student in jurisprudence, curious in that behalf, may find in those cases and authorities the reasoning supporting those propositions.”

There were other articles from the same paper introduced in evidence. In some it was shown that the *Post-Dispatch* was instrumental in having the property of those corporations taxed. It was valuable property and formerly belonged to the St. Louis Fair Association. By statute it was exempted, although the racing business overshadowed the agricultural fair feature. It practically became private property when sold to the Cella, Adler and Tilles corporation by the St. Louis Fair Association. For a paper to advocate a just distribution of taxation is no evidence of malice toward a mere stockholder in one of the corporate owners. For a paper to say that corporate property should be taxed is no evidence of malice toward a mere stockholder. In other articles the paper published what was being done by the officials of St. Louis county toward enforcing the law of 1905 which prohibited bookmaking. These articles are not evidence of express malice toward a mere stockholder or even manager of a corporation.

Other evidence as to express malice does not rise higher than the above.

So we say, taken as a whole, the evidence fails to show malice toward the plaintiff, Tilles, and if the article is privileged, as we think, there is no liability and the trial court should have so instructed the jury.

V. There are, to our minds, numerous errors in the trial which would authorize a reversal and remanding of the cause, but entertaining the views which we do on the last proposition discussed, we have confined the discussion to questions which go solely to a final disposition of the case here.

From what we have said the judgment should be reversed without remanding the cause and such will be the order.

PER CURIAM.—The foregoing opinion of GRAVES, P. J., in Division Number One, is hereby adopted as the opinion of this court. All concur, except *Woodson, J.*, who dissents in opinion filed.

DISSENTING OPINION.

WOODSON, J.—I dissent from paragraph four of the opinion delivered in this case for the reason that I do not think that the court can declare as a matter of law that the interview of General Hadley, published by appellant, which constitutes the libelous charge complained of, was in fact the official opinion of the Attorney-General.

That was a fact to be determined by the jury, upon the evidence introduced, and not by the Attorney-General himself; and until that fact was established, the opinion, which was oral, was not admissible in evidence, much less the interview purporting to give to the press the substance of the opinion.

This is elementary and needs no authority to support it.

The fact that General Hadley was introduced as a witness, and testified that the interview was the substance of his opinion, does not alter the rule just stated; nor is that rule changed by the fact that there was no other evidence introduced upon the subject. Still it was a question for the jury. [*Rinehart v. Railroad*, 204 Mo. l. c. 276; *Milliken v. Commission Co.*, 202 Mo. l. c. 655.]

Nor was respondent bound by the statement of any one of his witnesses in the case. [Helling v. United Order, 29 Mo. App. 309; Spurgin v. Frick, 73 Mo. App. 128; Brown v. Wood, 19 Mo. 475.]

I, therefore, dissent from the result reached in the opinion.

E. W. GRAVES v. STEPHEN M. CHAPMAN et al.,
Appellants.

Division One, March 29, 1912.

1. **BILL OF EXCEPTIONS: Lost: Substitution.** The purported bill of exceptions substituted in lieu of the original which has been lost or destroyed, should be something more than calls for the oral testimony of witnesses. It should at least contain their names, and the substance of their testimony.
2. ———: ———: ———: **Copy: Legal Conclusion.** A statement by counsel that because the original bill of exceptions and the stenographer's notes were lost or destroyed he has been unable to supply a copy thereof, is simply the statement of a legal conclusion and not of the facts by which the court could determine whether such copy could be reproduced. Appellant should make an honest effort to supply a substantial copy of the lost bill or the substance of the testimony.
3. ———: ———: **New Trial: Negligence of Counsel and Clerk.** Respondent should not be penalized by another trial, and its uncertainty, because of the negligence and carelessness of counsel for appellant, or the misconduct of the clerk in permitting counsel for other defendants to remove the bill of exceptions from his office and to retain them for years without inquiry as to their safety or whereabouts.
4. ———: ———: ———: **Deceased and Scattered Witnesses.** It would be unjust to respondent to grant appellant a new trial after the witnesses are scattered or dead, simply because the bill of exceptions, through no fault of respondent, has been lost or destroyed.
5. ———: ———: ———: **Status Quo.** A new trial because of a loss of the original bill of exceptions should not be granted where the parties at a new trial would not be in *statu quo*, and where appellant permitted three years to elapse after the bill was lost or destroyed without making any effort to supply it.

Appeal from Butler Circuit Court—*Hon. J. C. Sheppard*, Judge.

MOTION TO REVERSE AND REMAND DENIED.

Ernest A. Green for appellant.

D. W. Hill for respondent.

WOODSON, J.—This suit was instituted in the circuit court of Butler county, some time prior to January 1, 1907, by the plaintiff against the defendant, under section 650, Revised Statutes 1899, to quiet the title to one hundred and twenty acres of land situated in said county.

Service was had upon all the defendants and all of them except the National Iron Mining Company, Isaac Luke and J. P. Thomas, made default, and in due time judgment went accordingly against them. The defendants just named answered and filed a cross-bill, but we are not informed as to its nature or contents.

On January 24, 1908, and during the January term of the court, a trial of the cause was had, and after the plaintiff introduced his evidence in chief, he dismissed the cause as to the three defendants before named, whereupon they introduced evidence in support of their cross-bill. The court then took the case under advisement until the next term, and on April 19, 1908, it rendered judgment by default against the non-answering defendants in favor of the plaintiff, and found the issues in favor of the plaintiff against the answering defendants on their cross-bill, and rendered judgment accordingly.

In due time they filed their motions for a new trial, which were by the court overruled.

They then duly appealed the cause to this court, and presented to the trial court their bill of exceptions,

which was by the court signed, sealed and in due time made a part of the record.

As will more fully appear hereafter, the bill of exceptions and other files in the case were lost or destroyed. On November 10, 1911, the appellants presented to the trial court a substitute bill of exceptions and moved the court for leave to file it in lieu of the lost one, which the court refused to do because it was not a substantial copy of the original bill.

On December 23, 1911, the appellant company filed in this court a motion to reverse the judgment of the circuit court, and to remand the cause for a new trial.

Since there is nothing before this court, except a short transcript of the judgment, etc. (which is irrelevant to the question here presented), and the motion to reverse and remand, with respondent's suggestions in opposition thereto, it becomes necessary to copy the two latter for the reason that they serve not only the functions of a motion and suggestions in opposition thereto, but also contain the statement of the record facts upon which they are predicated. In other words, they constitute the petition and answer in the case, the affidavits in support thereof, as well as the motion and the suggestions in opposition.

The motion, which is duly verified, is as follows (formal parts omitted):

"Now comes the National Iron Mining Company, a corporation, one of the above named appellants, and respectfully makes known and shows to the court the following, to-wit:

"That this is an action commenced by the plaintiff, in the circuit court of Butler county, Missouri, against this appellant as well as several other defendants, to quiet title to one hundred and twenty acres of land in Butler county, Missouri; that said land is of great value by reason of there being located thereupon an iron mine in which extensive mining opera-

tions have been carried on by this appellant and defendants for several years; that the exact value of said land is unknown by reason of the exact quantity of iron ore to be found upon said land being unknown; that this action came on for trial on Friday, the 24th day of January, 1908, and the 16th day of the regular January term, 1908, of the Butler County Circuit Court; and that before the close of plaintiff's evidence, the plaintiff by leave of court dismissed his petition herein as to this appellant, National Iron Mining Company, and this cause was submitted to the court upon the cross-bill of this appellant, as well as other answering defendants, and that upon the conclusion of the trial of said cause, on the 24th day of January, 1908, the same was taken under advisement by the circuit court of Butler county, Missouri, and thereafter, to-wit, on the 11th day of May, 1908, and the 19th day of the regular April term, 1908, of the Butler County Circuit Court, a judgment was rendered herein, quieting the title of plaintiff to all of the land described in his petition, said judgment being rendered against all of the defaulting defendants, upon plaintiff's original petition, and said judgment being rendered in favor of the plaintiff as against this appellant and other answering defendants upon their respective cross-bills.

"And this appellant, National Iron Mining Company, respectfully makes known to the court, that on the same date as the rendition of judgment against it, this appellant, as well as its codefendants, Isaac Luke, and J. P. Thomas, filed their motion for a new trial in said cause, and also their motion in arrest of judgment in said cause; that said motion for a new trial and motion in arrest of judgment coming on to be heard on said 11th day of May, 1908, the same were in all things overruled by the court. To which action of the circuit court in overruling its motion for a new trial and also its motion in arrest of judgment, this

appellant, National Iron Mining Company, duly objected and excepted.

“That thereupon, on the same, to-wit, the 11th day of May, 1908, and the 19th day of the regular April term, 1908, of the Butler County Circuit Court, this appellant filed its application and affidavit in due form for an appeal herein, and an appeal was granted by said court to this court, and that this appellant was further granted ninety days from said 11th day of May, 1908, in which to perfect and file its bill of exceptions in this cause.

“And this appellant states that thereafter, to-wit, on the 15th day of July, 1908, this appellant, together with its codefendants Isaac Luke and J. P. Thomas, presented its bill of exceptions to Hon. J. C. Sheppard, judge of the circuit court of Butler county, Missouri, and the judge who tried said cause, and prayed that the same might be signed and sealed as such; which was accordingly done on said 15th day of July, 1908, by said judge of the circuit court of Butler county, Missouri.

“That thereafter, to-wit, on said 15th day of July, 1908, the bill of exceptions of the appellant National Iron Mining Company was filed in the office of the circuit clerk of Butler county, Missouri, and accordingly made a part of the files in said cause.

“And this appellant respectfully makes known and shows to the court that thereafter, to-wit, on or about the 10th day of June, 1909, one W. H. Meredith, an attorney at law, located at that time in the city of Poplar Bluff, Missouri, but now located in the city of Port Orford, in the State of Oregon, went to the office of the circuit clerk of Butler county, Missouri, and acting as attorney for one of the defendants in this case, namely, one S. M. Chapman, procured from said circuit clerk all of the papers, files, and bill of exceptions in this cause; that said attorney, W. H. Meredith, took said files, papers and this appellant's bill

of exceptions to his law office in the city of Poplar Bluff where he was making use of said papers, files and bill of exceptions; that while said papers were in his possession, there was a large fire occurred in the city of Poplar Bluff, which in all probability destroyed all of the papers, files and the bill of exceptions of this appellant in said cause.

“And this appellant makes known and states to the court that there are no papers, files or bill of exceptions, or anything pertaining to this case, now remaining in the office of the circuit clerk of Butler county, Missouri, and that the only memorandum which said circuit clerk has in his office, pertaining to this case, is the receipt given by the said W. H. Meredith for said papers, files and said bill of exceptions.

“And this appellant respectfully makes known and shows to the court that the stenographer’s notes taken at the time of the trial of said cause, by R. B. Herrington, who was then the official court stenographer of the Butler County Circuit Court, have been lost, misplaced or destroyed and that there is no way by which this appellant can perfect the record in this case.

“And this appellant states and makes known to the court that it has endeavored to supply the papers, files and bill of exceptions in said cause, but has been unable to so do; that on the 10th day of November, 1911, this appellant presented to the honorable circuit court of Butler county, Missouri, its application praying that it might be permitted to supply the papers, files and bill of exceptions in said cause; but that said circuit court of Butler county, Missouri, refused said permission to this appellant, because the notes of said stenographer, taken upon the trial of said cause, could not be found and said court was not firmly convinced as to the correctness of the proposed supply bill of exceptions.

“And this appellant makes known and states to the honorable court that all of the matters hereinbefore set forth are fully verified by the attached affidavits of W. H. Meredith, the attorney who took said papers from the office of the clerk of the Butler County Circuit Court; of William McGuire, circuit clerk of Butler county, Missouri; R. B. Herrington, former court reporter of the Butler County Circuit Court; and Hon. J. C. Sheppard, judge of the Butler County Circuit Court; as well as by the affidavit of the attorneys for this appellant.

“And this appellant makes known and states to the court that, if this cause should be reversed and remanded, this cause could be retried without any difficulty; all of the testimony again submitted to the court and this matter again brought before this court for review.

“This appellant further represents and states to the court that, unless said cause is reversed and remanded to the end that the same may be retried, this appellant will suffer a gross injustice, by reason of the fact that it will not only suffer the loss of the real estate involved in this action, but will also be compelled to pay large and heavy sums of money for the iron ore which it has taken from said land, and for which an action of ejectment and trespass is now pending in the Butler County Circuit Court, awaiting the final termination of this action.

“And this appellant further makes known and states to your honorable court, that it has prosecuted its appeal with all due diligence and in perfect good faith, believing that it has a meritorious appeal and that it is the actual owner of the minerals and mineral rights, including all the iron ore found under the surface of the lands in controversy herein.

“And this appellant respectfully calls the court's attention to the attached affidavit of the Hon. Jesse C. Sheppard, who states therein that he has good cause

to believe and does believe that there are reasonable grounds for review of his action in passing upon this case.

"And this appellant respectfully states and further makes known to this court, that it is through no fault of this appellant or its counsel, and through no lack of diligence on its part, that said papers have been lost, burned up or destroyed; but it earnestly prays the court that this cause may be reversed and remanded to the end that full justice may be done to it, as well as to the other parties to this action, and that it may have an opportunity to submit to this court its rights in the premises.

"This appellant does not submit this motion in the light of any precedents heretofore established, but merely with the belief that the only aim of this court is to secure substantial justice to all litigants appearing before it, and with that end in view it submits herewith its motion and application, praying that this cause may be reversed and remanded to the end that substantial justice, and that alone, may be done to this appellant, respondent herein, and its co-defendants."

Respondent's suggestions in opposition to the motion to reverse and remand, which is also duly verified, are as follows (formal parts omitted):

"Now at this time comes the respondent in the above entitled cause and suggests that the motion filed by the appellants to reverse the judgment and remand this cause should be denied for the following reasons:

"1st. Because the motion filed by the appellants on its face shows that the appellants are guilty of laches or negligence in perfecting their appeal in this: It is shown by said motion that their bill of exceptions remained on file in the circuit clerk's office from July 15, 1908, until the 10th day of June, 1909, which af-

forded reasonable and ample time in which appellants could have prepared a full transcript or abstract in lieu thereof.

"2nd. Because the appellants are guilty of negligence in failing to file a timely motion to remand this cause—said motion having been served on the respondent for the first time on November 28, 1911; while the fire which is supposed to have destroyed the bill of exceptions in this case occurred on the 5th day of September, 1909.

"3rd. Because the appellants are guilty of negligence in not discovering the loss of the bill of exceptions until more than three and one half years after the final judgment was rendered in the trial court, or were guilty of negligence in not filing a timely motion after the discovery of the loss of the bill of exceptions.

"4th. Because on or about the 27th day of February, 1909, the defendant Stephen M. Chapman died, and although he was a defendant, he was one of the most important witnesses for the respondent; and the respondent knows of no one by whom he could establish all the facts which were known to the defendant Stephen M. Chapman.

"5th. Because a new trial of this case would involve considerable expense in taking the testimony of Addison F. Burns, an important witness for respondent, in Washington county, Pennsylvania, if he is living; that the respondent is informed and believes that the said Addison F. Burns is very old and feeble.

"6th. Because this respondent should not be penalized by the imposition of a new trial, as a result of the negligence of the official stenographer in losing or misplacing his stenographic notes.

"7th. Because this respondent should not be penalized by the imposition of a new trial because of the negligence of the circuit clerk in losing or misplacing the official stenographer's stenographic notes if they were ever deposited with him.

"8th. Because this respondent should not be penalized by the imposition of a new trial as a result of the negligence of the circuit clerk in permitting the bill of exceptions to remain out of his office from the 10th day of June, 1909, until the 5th day of September, 1909, when they were probably destroyed by fire; and in this connection respondent calls the attention of this court to the case of Redway v. Chapman, 48 Mo. 218, and Dameron v. Harvey, 23 Mo. App. 197.

"9th. Because this respondent should not be penalized by the imposition of a new trial as a result of the negligence of the attorney for the appellants in losing their copy of the bill of exceptions, or in failing to provide himself with a copy of such bill of exceptions.

"10th. Because this bill of exceptions has been lost, burned or misplaced as a result of the fault of Mr. W. H. Meredith, who was the attorney for the defendant Chapman, or William Ferguson, who was president of the National Iron Mining Company, as shown by the following correspondence:

" "December 11, 1911.

" "MR. W. H. MEREDITH,

Port Orford, Curry Co., Oregon.

" "Dear Sir:

" "I have before me your affidavit made on the 15th day of November, 1911, regarding the loss of the bill of exceptions in the case of E. W. Graves, plaintiff, v. The National Iron Mining Co. et al., and in view of the fact that your memory seems a bit hazy about whom you were representing I want to refresh your recollection as to some of the facts:

" "You state in your affidavit that you took this bill of exceptions from the clerk's office while you were associated with Mr. Chapman, but you must bear in mind that this case had already been decided against Mr. Chapman—he had taken no appeal, and,

as I understand from another source, you were in fact investigating these papers on behalf and as attorney for William Ferguson.

“ ‘Now, please write me, by return mail, stating the exact facts. I enclose stamp for reply.

“ ‘Wishing you unbounded success in your new field, I am,

“ ‘Yours truly, DAVID W. HILL.’

“ ‘Imperial Hotel,

“ ‘Portland, Ore., Dec. 25, 1911.

“ ‘MR. DAVID W. HILL,

Poplar Bluff, Mo.

“ ‘My dear Hill:

“ ‘Your letter of the 11th inst. has just been forwarded to me here. I have been away from home two weeks on a suit and business matters for our Port, so did not receive your letter sooner.

“ ‘As to the case of Graves v. National Iron Mining Co. et al. my memory is hazy in the matter, and I could not positively say now who I was representing when I took those papers from the clerk’s office. I know that I did have some consultation with Wm. Ferguson relative to some of those mining cases, and it might have been that I was investigating the case in his behalf when I had those papers. I did not remember having them until Mr. Green wrote me that he found my receipt for them in the clerk’s office, and wanted me to look among my papers and see if I had them. I knew from the date of the receipt that the papers must have been in my office at the time of the fire, and did have some recollection of having gotten them. I know nothing of the merits of the controversy between your Mr. Green’s clients, and do not wish to make any statement about which I am uncertain that will affect the case. I only know that if I had those papers and left my receipt for them, as stated, I have not got them now and they must have

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been destroyed in the fire. Whether I was at that time investigating them for Chapman or Ferguson, I do not know.

“ ‘Sincerely yours, W. H. MEREDITH.’ ”

“And in this connection the court’s attention is called to the fact that at the time Mr. Meredith took the bill of exceptions from the clerk’s office, judgment had already been rendered against the defendant Chapman, who took no appeal.

“11th. Because the alleged attempt on the part of the appellants to supply the bill of exceptions in the trial court was apparently not serious but perfunctory, and made solely for the purpose of having a seemingly plausible basis upon which to base a motion to reverse and remand; and in support of this contention of respondent, he herewith presents a copy of the proposed supply bill of exceptions, which the appellants presented to the trial court and which was held to be insufficient on November 10, 1911, which copy is marked ‘Exhibit A’ and make a part of these suggestions; and in this connection the court’s attention is called to the statement of the testimony of Isaac Luke, as appears on page 9 of Exhibit A, which is in direct conflict with the statement of the appellants’ attorney, W. N. Barron, as contained in his brief presented to the trial court, which we quote as follows:

“ ‘The defendants Luke and the Mining Company have shown a possession of part of the tract for upwards of ten years and a continuous possession for more than *seven years* under claim and color of title to all of the land in controversy. This possession of the two defendants named *fails to constitute perfect title* to the property in suit only by reason of *not having existed for the full statutory period of ten years.*’ ”

“Thus, it will be seen that the National Mining company is nothing more nor less than a trespasser when we consider this statement in connection with the deed from Samuel Petersberger to Isaac Luke, under whom the National Iron Mining company claims—this deed being dated November 2, 1900, as appears on page 9 of said exhibit A; while exhibit A shows that the same Petersberger had years and years before that time conveyed this land to parties under whom respondent claims. All of which absolutely refutes the statement made by appellants that they believe they own the land in suit and have a meritorious appeal; and in this connection the court’s attention is called to the fact that in this proposed supply bill of exceptions the oral testimony of only one witness purports to be given, while in truth and in fact four or five witnesses testified orally—among them, as respondent’s attorney remembers, being W. I. Hooper, E. W. Graves, S. M. Chapman and others. All of which respondent respectfully submits conclusively shows that the attempt to supply the bill of exceptions was perfunctory and not serious.

“12th. Because the appellant National Iron Mining Company should not, under the existing circumstances, be permitted to escape the judgment of the trial court for the purpose of defeating the ejectment suit of the respondent now pending for the recovery of the value of the iron ore, which the said Mining Company caused to be taken from the land in suit since it was adjudged to have no title or interest therein.

“13th. Because the *ex parte* affidavit of the trial judge should not be permitted to overturn a solemn decree rendered in favor of respondent after a fair trial and a full investigation of the authorities, and after that decree had been further approved by the trial court by the overruling of the appellants’ motion for a new trial. At the time the trial court rendered

the decision and passed on the motion for a new trial, the facts and the law were certainly better fixed in the mind of the court than they were at the time he made the ex parte affidavit in November, 1911, more than three and one-half years after the trial of this cause. To reverse a solemn decision of the chancellor on such ex parte affidavits as are filed in this case would be setting a dangerous precedent for the future.

"14th. Because Rule 16 of this court contains no exceptions, and the appellants having failed with Rules 11, 12, 13, and 15, appellants' motion to reverse and remand should be denied and the respondent's motion to dismiss the appeal should be sustained.

"15th. Because it is not even suggested that respondent or his counsel have been at fault or negligent regarding the loss of the papers in question."

There is attached to the respondent's suggestions in opposition to the motion a copy of the bill of exceptions, presented by counsel for appellant to the circuit court, which he moved to be substituted for and in lieu of the original and lost bill.

Counsel for appellant cites no authority in support of this extraordinary motion and frankly admits that he knows of none which lends support to his prayer.

After as careful a consideration of the question presented, as we are able to make from the meagre facts before us, we are of the opinion that the motion should be denied for several reasons:

(a) From an inspection of the copy of the bill of exceptions presented to the circuit court for substitution in lieu of the original, it is perfectly apparent upon its face that it is in no sense a correct copy of the original.

Quite frequently we find in our reports the words "skeleton bill of exceptions," or some equivalent words, but the copy which in this case was presented to the circuit court for substitution is the first perfect skeleton of that character which has ever come

under my observation. It is in truth and fact a skeleton bill, with no flesh or sinews or other foreign substance whatever contained in it. Nothing but numerous "calls for" tied together only with the paper upon which they are written.

It appears that there were a number of witnesses, some six or eight, who testified orally at the trial, in open court. Neither their names nor their testimony was attempted to be set out, or stated therein, with the exception of one witness, and his testimony is so brief and meagre as to be almost unintelligible.

It should be borne in mind that the respondent, and not the appellant, presented to this court the so called bill of exceptions, which the latter presented to the circuit court for substitution.

Counsel who represents appellant in this court had nothing to do with the trial of the cause in the circuit court, the appeal, or with the so-called bill of exceptions offered to be filed in the cause, and is not therefore responsible for any of the acts of negligence mentioned in this opinion.

(b) There is no showing made to this court, that said copy of the bill of exceptions so presented to the circuit court was a copy of the original bill which was lost or destroyed; and by carefully reading the appellant's motion to reverse the judgment, it will be seen that counsel does not state that respondent made an honest effort to supply a substantial copy of the lost bill, but contents himself with the statement that because the original bill of exceptions and the stenographer's notes were lost or destroyed, he has been unable to supply a copy thereof. That is simply stating a conclusion and not the facts from which this court, or the circuit court could determine whether or not a copy of the bill could be produced.

Up to a few years ago, all bills of exceptions were prepared by counsel, without the assistance of a stenographer or his notes, and we are unable to see

why such a thing may not be done at this day. Clearly it would be no more difficult to prepare a copy of the original without the stenographer's notes, than it would be to prepare the original itself. But be that as it may, we would not be justified in the absence of some additional showing in holding that counsel could not prepare a copy of a long bill of exceptions, simply because the stenographer's notes had been misplaced.

There is no showing made here nor was there such made to the circuit court, that the lost bill was lengthy, that the evidence introduced was voluminous, or that the substance of the witnesses' testimony could not be reproduced, which is often done, as we know from common knowledge and experience.

(c) We are favorably impressed with the suggestion of counsel for respondent that their client should not be penalized by another trial, and its uncertainty, through the negligence or carelessness of counsel for defendants, or the misconduct of the circuit clerk in permitting the records of his office to be removed therefrom by counsel and retained by them for years, without inquiring as to their safety or whereabouts.

(d) We are favorably impressed with the suggestion of counsel for respondent that it would be highly unjust to his client, at this late date, to be required to stand another trial, after some of his witnesses are dead and the others scattered to the four quarters of the country.

(e) Nearly four years have elapsed since the judgment in this case was rendered and more than three since the bill of exceptions was lost or destroyed, but the fact was not discovered by appellant until last month. Why this delay? Can such conduct be excused? We think not. If counsel had paid not ordinary, but the slightest, attention to this case, he long ago would have discovered that the bill of exceptions had been lost or destroyed, and would have

been in a much better position to have substituted the bill, than he is now, since the witnesses are scattered or dead.

This negligence of the appellant should not be visited upon the respondent, who is no wise blamable for the loss or destruction of the bill. A reversal of this judgment under the circumstances would not restore the parties to their *statu quo*. The respondent would not have the testimony of all the witnesses he had at the last trial. Such a reversal would reward the negligence of the appellant, and penalize the innocence of the respondent.

View this motion as you may, there is no merit in it.

We have not considered the question as to whether or not, under the facts of this case, this court has the legal authority to sustain the motion, but have placed our ruling solely upon the fact that there is no merit in it.

We are, therefore, of the opinion that the motion should be denied, and it is so ordered. But appellant has leave to renew application. All concur.

MARY A. NEIL v. JANE L. TUBB et al., Appellants.

Division One, March 29, 1912.

1. **SCHOOL FUND MORTGAGE: Statutes: Secs. 10817 and 10819: Construed Together.** Section 10817, Revised Statutes 1909, providing that a school fund mortgage shall contain a condition that if default be made in the payment of the principal or interest the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, without suit on the mortgage, proceed to sell the mortgaged premises, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a court of competent jurisdiction foreclosing the mortgage; and section 10819, Revised Statutes 1909, providing that when the principal secured by a mortgage containing a power of sale shall become due and

payable the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same with costs upon the property conveyed by the mortgage, and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a *fiert facias* on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly, are to be construed together; and if the sheriff undertakes to sell the mortgaged property when no order of the county court directing him to sell was made, his act is null and void.

2. ———: Foreclosure and Sale by Sheriff: No Order of Court. A sale by the sheriff of the mortgaged property, mortgaged to the county by a school fund mortgage, when no order of the county court directing him to sell has been made, as required by section 10819, Revised Statutes 1909, is null and void.

3. ———: ———: ———: Nunc Pro Tunc Order: Fictitious Proceeding: Notice. When a court at a former term made an order or rendered a judgment which should have then been entered of record but was not, it may be entered at a subsequent term as for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term, and then it becomes a *nunc pro tunc* order or judgment; but when entered it is not the order or judgment now made, but the one then made. Where the county court at its May term, 1905, failed to make an order to the sheriff, reciting the debt and interest due on a school fund mortgage, and commanding him to levy the same, with costs, upon the mortgaged property, an order made at the February term, 1907, after the property had been sold by the sheriff and the mortgage marked satisfied on the record by the clerk, calculating interest on the bond down to date and declaring the mortgage was then due and unpaid, was not a *nunc pro tunc* order, but in all respects in form an original order. Nor did the court at that February term have any right to make an order declaring the mortgage was due and unpaid, and with that statement as a basis order a sale of the land; and, if plaintiff, or her grantor, who purchased at the sheriff's sale made in pursuance thereof, knew all these facts, she did not acquire the title, for that was a fictitious proceeding.

4. ———: ———: ———: Order Recited in Clerk's Certificate. A clerk's order to the sheriff to sell the mortgaged property, reciting therein that the county court had previously made an order to that effect, when in fact no such order had been made, was an unauthorized act, and cannot be held to supply the order itself. The only act in that regard that the statute authorizes the clerk to perform is to make a certified copy of the order of the court and deliver it to the sheriff.

5. ———: ———: ———: ———: Report of Sheriff Approved. Nor does the fact that the sheriff, who sold the mortgaged property when there was no order of the court directing him to sell, reported the sale to the county court and the court approved it, give any validity to the sale. The court cannot by its approval give validity to an unauthorized act.
6. ———: ———: ———: Collateral Attack: Ejectment. The defendant in an action of ejectment, to which she has answered by a general denial, has the right to defend her possession, and when plaintiff offers proof of his title to object to it for infirmities apparent on its face. Defendant in such case does not seek to have annulled the sheriff's deed under which plaintiff claims, made in the foreclosure of a school fund mortgage without an order of court, nor does she make a collateral attack upon that deed, but she simply requires plaintiff to make legal proof of his title.

Appeal from Butler Circuit Court.—*Hon. J. C Sheppard*, Judge.

REVERSED.

E. R. Lentz for appellants.

(1) The county courts have the exclusive control of the management, investment and collections of the school funds of their respective counties. Their powers are fixed and determined by statute. The provisions are found in Secs. 10813 to 10821, R. S. 1909. (2) The provisions in relation to the conditions of the mortgage and manner of foreclosure are prescribed by statute. R. S. 1909, sec. 10817. A school fund mortgage made in pursuance of this section cannot be foreclosed by the sheriff until the county court has made and delivered to him its order commanding such foreclosure, as provided in section 10819. *Benton Co. v. Morgan*, 163 Mo. 675. (3) Before the sheriff has any authority to sell, the county court must make an order to the sheriff reciting the debt and interest to be received, and commanding him to levy the same with costs, upon the property conveyed by the mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being deliver-

ed to the sheriff, shall have the effect of a *feri facias* on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly. R. S. 1909, sec. 10819; Benton Co. v. Morgan, 163 Mo. 675. (4) The statute demands that the county court make an order, etc. The county courts are declared by statute to be courts of record, and are required to keep just and faithful records of their proceedings. R. S. 1909, sec. 3845. Courts of record can only speak through their records. Medlin v. County, 8 Mo. 235; City v. Railroad, 81 Mo. 293; Cummings v. Brown, 181 Mo. 718; County v. Salmon, 201 Mo. 151; Morrow v. County, 189 Mo. 624; Riley v. County, 96 Mo. 321. Parol evidence is inadmissible to contradict or supply a record. Milan v. Pemberton, 12 Mo. 598; Mobley v. Nanne, 67 Mo. 549; State v. Ross, 118 Mo. 43. (5) A simple reading of the so-called order of sale will show that the paper read in evidence was not an order of the county court, duly certified, as required by statute, and does not purport to be such, but on its face purports to be a paper in the nature of a special execution, issued by the clerk, upon a supposed judgment rendered by the county court. The statute gives no authority to the county clerk to issue any such paper. The only paper the clerk was authorized to give to the sheriff was a copy of the order of the county court, and that duly certified. Here there was neither. The paper was not a copy of an order of the county court. Nor was it certified as being such. Hence it conveyed no authority upon the sheriff to either sell or convey the land. R. S. 1909, sec. 10819; Benton Co. v. Morgan, 163 Mo. 675. (6) The deed is void for want of necessary recitals. It recites no authority to sell. R. S. 1909, sec. 2231; Turner v. Stine, 18 Mo. 586; Wilhite v. Wilhite, 53 Mo. 74. (7) The debt secured by the mortgage was paid in full on October 21, 1905. On the same day the clerk of the county court delivered the bond and mortgage to the makers. The payment

of the debt absolutely discharged the mortgage, and the county court, thereafter, had no power or authority to make the order which it thereafter did, on Feb. 6, 1907. This order and the deed made in pursuance thereof were therefore absolute nullities. 2 Jones on Mort., sec. 889; McNair v. Picotte, 33 Mo. 71; Pease v. Iron Co., 49 Mo. 128; Kempf v. Ins. Co., 41 Mo. App. 31; Seeser v. Southwich, 66 Mo. App. 670. (8) In the court below counsel argued that the county court had the power to make a *nunc pro tunc* order, supplying the order which should have been entered. But no such question is presented here. The order of Feb. 7, 1907, does not pretend to be a *nunc pro tunc* order, but is from start to finish an original order. (9) None of the elements of estoppel are here present. (10) All the matters herein shown may be given in evidence under the general denial in an action of ejectment. Benton Co. v. Morgan, 163 Mo. 678.

Phillips & Phillips for respondent.

(1) The appellants in their brief say that a school fund mortgage made in pursuance of the statute cannot be foreclosed until the county court has made and delivered to the sheriff its order commanding such foreclosure, and cites Benton Co. v. Morgan, 163 Mo. 675. The vice of the argument herein is that in the Benton county case there was no order ever made to sell the land. Here an order was made, as is evidenced by the order, signed and certified to, by the county clerk and delivered to the sheriff, and upon which the sheriff acted. The court's attention is here called to the case of Fontain v. Hudson, 93 Mo. 69. This case has been followed and cited approvingly in Peltz v. Bollinger, 180 Mo. 259. (2) In the case of Jackson County v. Stone, 168 Mo. 582, the sheriff in the discharge of his official duty as such, levied on, advertised and sold the mortgaged land on a duly certified copy of the order of the county court, which the stat-

ute declares shall have the effect of a *feri facias*, on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly. Thus, by express statutory law, the duly certified copy of the order of the county court in the hands of the sheriff became, in fact, a final process, in the nature of and equivalent to an execution on a judgment of a court of general jurisdiction. *Benton County v. Morgan*, 163 Mo. 676. (3) It does not make any difference whether the clerk ever entered the order of the county court on the record proper, if in compliance with the law he formulated the order of the court, in legal language, signed and delivered it to the sheriff. Then under the doctrine laid down in *Fontain v. Hudson*, and *Peltz v. Bollinger*, the sheriff was authorized, and indeed, it was his duty, to proceed to sell the land. So when Mrs. Baird bought it at the sale and paid the amount of her bid and the sheriff receipted her for the same and immediately thereafter reported the same to the county court, and the court approved his report and then commanded him to make a deed to Mrs. Baird in conformity with his report, then all the formalities of law that were required had been complied with, and the deed to Mrs. Baird was a valid and legal deed. R. S. 1899, sec. 9833. A mere irregularity in judicial sales can only be called in question in a direct proceeding and cannot be inquired into collaterally in ejectment. *Bobb v. Graham*, 15 Mo. App. 289. (5) Where a judicial sale of land is made under the authority of a court having power to order it, and there is no pretense of fraud, the title of the purchaser will not be affected by slight irregularities in the sale. *Patte v. Thomas*, 58 Mo. 163. (6) If there was any informality in the order of June, 1905, it was corrected and ratified by the subsequent proceedings of the court, and again by the action of the court of February 7, 1907. It is a familiar principle, that where the officers of a county have the power to act, but act irregularly, the county

court may ratify such acts and thus make the acts binding in every essential particular. *Valle v. Fleming*, 19 Mo. 462; *County v. Salem*, 201 Mo. 150; *Lowring v. Groomer*, 110 Mo. 639; *Daniel's Practice*, 1219.

VALLIANT, J.—Plaintiff sues in ejectment for possession of the south half of lot 1, and east half of the south half of lot 2, of the northwest quarter of section 31 township 25 north of range 6 east, containing 62 acres, in Butler county.

The answer of defendant was a general denial. There is no dispute as to facts, but the dispute is as to the legal meaning and effect of certain documents in evidence.

Louise Sutton is the common source of title. September 21, 1900, she borrowed \$500 of the school fund of Butler county, and for its payment she and her husband executed a bond, with personal security, of that date, for that amount, to Butler county, and on the same date executed a mortgage on the land in suit, in conformity with the statute in such case made and provided, to secure the loan; the mortgage was duly recorded. April 25, 1901, Mrs. Sutton and her husband conveyed the land by warranty deed to the defendant Jane L. Tubb, subject however to that mortgage. That is defendant's claim of title.

Plaintiff introduced evidence which she claims tends to show that the mortgage was duly foreclosed, the land sold by the sheriff under foreclosure sale, August 10, 1905, to Mary Baird, the sale reported to the county court and confirmed; that afterwards Mary Baird by warranty deed conveyed the land to one Welborn, and he by like deed to the plaintiff. That is the plaintiff's claim of title.

The decision of the case turns on the point of whether the mortgage was legally foreclosed; the trial court held that it was and gave judgment for the plaintiff; the defendant appealed.

Let us first see what the statute requires and then see if the plaintiff's proof meets the requirements. Section 9824, Revised Statutes 1899, makes it the duty of the county court to cause the school funds of the county to be invested at interest on mortgages of land in the county double in value to the loan. Section 9827 makes it the duty of the county court to see to the collection of the moneys so loaned, and when paid the clerk is required to indorse the same on the bond and cause satisfaction of the mortgage to be entered on the record. Sections 9832 and 9833 make further provisions in reference to the mortgage to be taken to secure the loan. Section 9833 provides that the mortgage shall "recite the bond and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof . . . the sheriff of the county may, upon giving twenty days' notice of the time and place of sale . . . without suit on the mortgage proceed to sell the mortgaged premises . . . which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a court of competent jurisdiction foreclosing the mortgage." Section 9835 is as follows: "Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a *fiery facias* on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

We have quoted from the Revised Statutes of 1899, because the the rights of the parties in question

arose prior to the revision of 1909, but the statutes are the same now as they were then. [Sections 10817 and 10819, R. S. 1909.]

Under section 9833 it is required that the mortgage contain an authorization to the sheriff on condition broken, to proceed to advertise and sell to foreclose without suit, while section 9835 requires the county court on default of payment to make an order reciting the amount of the debt, principal and interest, and commanding the sheriff to levy the same with costs on the mortgaged property, describing it, and that a copy of the order duly certified be delivered to the sheriff and have the effect of a *fiery facias* as on a judgment of foreclosure in the circuit court. This court has held that those two sections are to be construed together; that if the sheriff should undertake to sell without a duly certified copy of the order of the county court delivered to him in accordance with section 9835, his act would be null and void. [Benton Co. v. Morgan, 163 Mo. 661.] In that case the county court had made the order required by the statute, but a certified copy of it had not been delivered to the sheriff, and for that reason it was held that his deed was void.

In the case at bar there was no evidence that the county court ever made an order in reference to this mortgage as required by statute. On the contrary the evidence showed that a careful search by a competent person familiar with the records of the court had been made and no such order could be found in the records; we do not understand the plaintiff as claiming that there is such a record. There was not delivered to the sheriff what purported to be a certified copy of such order. The plaintiff's evidence on that point was a certificate of the clerk of the county court dated June 6, 1905, reciting the mortgage and its contents, and saying that whereas the county court on the 8th day of May, 1905, did find the amount of principal and

interest due on the bond, and did then and there direct that judgment therefor should be entered against the principal and sureties on the bond, and that an order of sale of the property described in the mortgage should issue; then the clerk in his certificate proceeds to order the sheriff to advertise and sell the property. It was under that order that the sheriff acted when he sold the property to Mary Baird under whom the plaintiff now claims. Since that certificate is the main base of the plaintiff's title, perhaps we should copy it here in full:

"To the sheriff of Butler County, Missouri,
Greeting:

"Whereas, On the 21st day of September, 1900, Louise Sutton borrowed of the county of Butler, in the State of Missouri, the sum of five hundred (500) dollars, belonging to the capital school funds of the following described school townships in said county, in the several amounts set opposite thereto, respectively, viz.:

"And to the public school fund of said county
. . . \$500.00, total . . . \$500.00, for which
sum of borrowed money, the said Louise Sutton, J. N. Sutton, as principal with John H. Souders, William A. Spence and S. M. Chapman as securities, executed a bond to the said county, bearing date 21st day of September, 1900, in which said bond the principal and securities agree and bind themselves to pay to the said county, for the use and benefit of the school township hereinbefore mentioned, on or before the 21st day of September, 1901, the said sum of borrowed money, with interest thereon from the date of said bond, until paid, at the rate of eight per cent per annum; said interest to be paid annually on the 21st day of September, in each and every year, until the whole debt should be paid off and discharged, and

"Whereas, In consideration of the premises, and to secure the payment of said sum of borrowed money,

when the same should become due on the 21st day of September, 1901, the said Louise Sutton and James N. Sutton, her husband, executed and delivered to the said county, for the use and benefit of the said school township, their certain mortgage deed, whereby they conveyed to the said county the following described lot, tract or parcel of land, lying, being and situate in the county of Butler, State aforesaid, viz.: All of south half of lot one (1) of the northwest quarter and all east half of south half of lot two (2) of the northwest quarter of section thirty-one (31), in township twenty-five (25) of range six (6) east, containing 62.28 acres, more or less.

“Upon this express condition, however: That it the said principal and securities should well and truly pay or cause to be paid, the said sum of borrowed money, and all the interest thereon, according to the tenor and effect of said bond, that then, and in that case, said mortgage deed should become void, and that if default should be made in payment of said sum of borrowed money, or the interest thereon, or any part thereof, at the time when they should severally become due and payable, according to the tenor and effect of said bond, that then the then acting sheriff of Butler county aforesaid, should (without any suit on said mortgage deed) proceed to sell at public auction, to the highest bidder, for cash in hand, the property therein conveyed and mortgaged, first giving twenty days public notice of the time, terms and place of sale by publication in some newspaper published in said county; and out of the proceeds of said sale to pay the costs attending such sale, and then the debt and interest due the county of Butler, as aforesaid; which said mortgage deed was recorded in the office of the recorder of said county of Butler, in Book 48, at page 41.

“And, Whereas, The county court of Butler county aforesaid, by an order made and entered of

record on the 8th day of May, 1905, doth find that default has been made in the payment of said sum of money according to the tenor and effect of the said bond, and that the said Louise Sutton is now indebted to the said county for the use of said school township's money in the sum of seven hundred and sixteen and 50-100 dollars, principal and interest, computed to this date, due and unpaid upon the said bond, and then and there directed that judgment therefor should be entered against said principal and securities in said bond, and that an order of sale of the property described in said mortgage deed should issue to satisfy the same;

"Now, Therefore, you, the sheriff of said Butler county, are hereby commanded to levy the said last mentioned sum of money upon the real estate hereinbefore described, and to sell the said real estate according to law to satisfy said debt, interest and costs; and make return of your proceedings under this orler to the next term of this court, to be held on the 7th day of August, 1905.

"Witness my hand and the seal of said court, the 6th day of June, 1905.

"GEORGE C. ORCHARD,

"Clerk of the County Court of Butler Co."

The sheriff executed a deed to Mrs. Baird and made a report of the sale to the county court at the November term, 1905, and an order was then made by the court approving the sale. In that report the sheriff said that he had acted in pursuance of an order of the court made at the July term, 1905.

In the order approving the sale there is no reference to any kind of an order of sale by the court. The clerk's certificate under which the sheriff acted did not refer to any action of the court at the July term, 1905, but recited that the court had made an order on the 8th of May, 1905, and the certificate itself was dated June 6, 1905.

The property was knocked off to Mrs. Baird at \$300 which sum she paid; \$28.66 thereof was applied to paying of costs of the sale, and the balance, \$271.34, was credited on the mortgage bond; after which, October 21, 1905, Mrs. Sutton paid the balance that was due on her mortgage and the clerk of the county court on that date, as the statute required, cancelled the bond and satisfied the mortgage on the record.

Afterwards litigation over the title began. Mr. Welborn, who had purchased from Mrs. Baird, brought suit in ejectment against Mrs. Tubb, the defendant in this suit; in the course of that suit it was developed that the defendant disputed the plaintiff's title on the ground that the county court did not order the sale under which Mrs. Baird bought, and when that fact appeared the circuit judge intimated that the point was well taken, whereupon the plaintiff, Welborn, dismissed his suit, and afterwards went before the county court and obtained an order reciting the bond and the mortgage and the conditions thereof and concluding: "And now on this 6th day of February, 1907, the court finds that default has been made in the payment of said sum of money according to the tenor and effect of said bond, and that the said Louise Sutton is now indebted to the county of Butler to the use and benefit of the capital school fund in the sum of eight hundred and nineteen dollars and eighty-six cents, principal and interest, computed to this date, due and unpaid on said bond. Wherefore," etc. The order goes on to enter judgment against Mrs. Sutton and the sureties for the amount on the bond and an order of sale to be addressed to the sheriff.

This proceeding was nearly two years after the mortgage debt had been paid, and satisfaction entered on the record by the clerk as the statute required. A certified copy of that order was delivered to the sheriff and he went through the form of making a sale thereunder, and the property was struck off to Welborn for

thirty-one dollars, which just covered the cost of that proceeding. Plaintiff relies on that deed as curing the defect in the former sale.

Plaintiff's learned counsel speak of this order of February, 1907, as an order *nunc pro tunc*, but in that they are mistaken; this order has no characteristic of an order *nunc pro tunc*. When a court at a former term has made an order or rendered a judgment which should have been then entered on the record but was not, it may be entered at a subsequent term as now for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term; but when entered it is not the order or judgment now made but that which was then made. This order which was made in 1907 does not purport to be the record of an order made in 1905, it makes no reference to an order made at a former term. It is in all respects in form an original order, calculating interest on the bond down to date and declaring that the mortgage was then due and unpaid. And there could not have been an order then made *nunc pro tunc* because there was no sufficient evidence before the court on which to base such an order.

Evidence introduced by plaintiff shows that the county court, when it made the order February 6, 1907, knew that this mortgage had been paid and that the circuit court in another suit had intimated that the plaintiff's title was defective for want of an order of sale and knew that the purpose of this proceeding in 1907 was to supply that defect. But whatever the county court may have thought of the merits of the case, it had no right to enter an order on its record saying that the mortgage was due and unpaid and on that statement order a sale of the land, and the plaintiff well knowing all those facts does not strengthen her cause by bringing that proceeding forward and

relying on it. That was a fictitious proceeding and plaintiff derives no title through it.

Going back to the certificate of the clerk June 6, 1905, plaintiff relies on the decision in Fontaine v. Hudson, 93 Mo. 62, l. c. 69-70, where it was held that an execution was valid though issued *eo instanti* on the rendition of the judgment, before the judgment had actually been written into the record; that it was sufficient if the record evidence is in existence when proof of the judgment becomes necessary. But in the case at bar the record evidence was not in existence when the proof of the judgment became necessary; there was no lawful evidence that there ever was such a judgment. The clerk's order to the sheriff to sell the property to foreclose the mortgage reciting therein that the county court had theretofore made an order to that effect was an unauthorized act; the only act in that regard that the statute authorized the clerk to perform was to make a certified copy of the order of the court and deliver it to the sheriff. But of course there could have been no certified copy of such an order because there was no such order. The sheriff reported the sale to the county court and that court approved it, but the court could not by its approval give validity to an unauthorized act.

Respondent in her brief says that appellant cannot attack the sheriff's deed collaterally, but only by a bill in equity. Appellant is not seeking to have the sheriff's deed annulled, she is simply defending her possession in an action of ejectment to which she has answered by a general denial, and when the plaintiff offers proof of her title the defendant objects to it for infirmities apparent on its face. Plaintiff in her action of ejectment must make legal proof of her title, otherwise she cannot recover. Her learned counsel in their brief make an argument on what they call the equity of the case, but this is a law suit in which legal titles must prevail.

Plaintiff has failed to show that she has a legal title to the land in question, therefore she is not entitled to recover. The judgment is reversed. All concur.

AUGUST BUSSMEYER v. CHARLES JABLONSKY, Appellant.

Division One, March 29, 1912.

1. **EASEMENT: Implied: Necessity: Conveyance.** An implied easement must rest upon a reasonable necessity. If there is another reasonable way of entrance over the grantee's own land on to the lot conveyed to him, an easement by implication will not be impressed upon the property adjoining, simply because that easement was there when both lots were owned by a common grantor and had been used by his tenants for a long number of years as a means of entrance upon the lot. So long as the element of necessity or reasonable necessity is lacking, the rule relating to dominant and servient estates does not apply. Unless the easement is necessary to the beneficial enjoyment of the property conveyed it will not be implied from a conveyance of the lot benefited by the existing easement by a deed which does not mention the easement.
2. ———: ———: ———: **Deed: Appurtenance.** Deeds are to be construed as meaning what the language in them imports. The deed describing lots by number, or by metes and bounds, cannot be held to include as an appurtenance an easement upon an adjoining lot, conveyed by the same common grantor, unless the easement is necessary to the enjoyment of the lot in favor of which it is claimed—a necessity that must be implied from the arrangement, nature and the long continued uses to which the segregated lots have been put and are from their nature to be put. It can never be implied from considerations of convenience.
3. ———: ———: ———: **Passage Way Between Houses.** There had been a hall or passage way between lots 7 and 8, which extended from the western line of lot 7 four feet to the building on lot 8, and was used as a means of entrance upon the rear of both lots, and had been so used for many years by the tenants of the common grantor, when he conveyed lots 8, 9, 10, 11 and 12 to plaintiff, and lots 5, 6 and 7 to defendant,

describing them by number and by metes and bounds, and omitting all reference to the passageway. There was a street in front of the lots and an alley at the rear, and in the west side of the building on lot 8 there were three doors opening upon lot 9, and plaintiff testified that he could use lot 9 and those doors as a means of entrance upon the rear of lot 8 "only" because lot 9 was his "own ground." *Held*, that the passageway was not a strict necessity, or a reasonable necessity to a proper use of lot 8, but a matter of convenience, and being wholly on lot 7 conveyed to defendant, no easement can be implied.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule*, Judge.

REVERSED AND REMANDED (*with directions*).

August W. Waltz, Jr., and *W. G. Carpenter* for appellant.

(1) Plaintiff's petition does not set forth facts showing that any necessity existed for an easement in the passageway over defendant's property. In Missouri and many other States there must be, if not a "strict necessity" to support the easement, at least a "reasonable necessity." *Barrett v. Bell*, 82 Mo. 110; *Mulrooney v. Obear*, 171 Mo. 613; *Vossen v. Dantel*, 116 Mo. 379; *Peters v. Worth*, 164 Mo. 431; *Tiedeman on Real Property* (3 Ed.), sec. 432. (2) Three elements are essential to create an easement by severance: (a) A separation of the title; (b) So long continued in use and so obvious in construction as to show permanency; (c) must be necessary to the beneficial enjoyment of the land granted. Long continued, obvious and permanent use. *Reiners v. Young*, 109 N. Y. 648; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Jobling v. Tuttle*, 75 Kan. 351; *Ice Co. v. La Plant*, 136 Iowa, 621. Must be necessary. *Whiting v. Gaylord*, 66 Conn. 337; *Mosher v. Hibbs*, 24 Ohio (C. C.) 375; *Goodall v. Godfrey*, 53 Vt. 219; *Seidel v. Bloeser*, 77 Mo. App. 180; *Mulrooney v. Obear*, 171 Mo. 619; *Barrett v. Bell*, 82 Mo. 113; *Brakely v. Sharp*, 9 N. J. Eq. 9; *Webber v. Miller*, 9 Ohio (C. C.) 674; *Miller*

v. Hoeschler, 126 Wis. 263; Buss v. Dyer, 125 Mass. 287; Adams v. Marshall, 138 Mass. 228. (3) The "necessity" must be a real necessity, not a mere convenience. Field v. Mark, 125 Mo. 502; Vossen v. Dantel, 116 Mo. 385; Paine v. Chandler, 134 N. Y. 385; Hyde v. Jamaica, 27 Vt. 460; Valley Falls Co. v. Dolan, 9 R. I. 489; Hall v. Austin, 20 Tex. Civ. App. 63; Ward v. Robertson, 77 Iowa, 159; Allen v. Kincaid, 11 Me. 156; Burns v. Gallagher, 62 Md. 462; Washburn on Easements (4 Ed.), p. 107, sec. 3; Jones on Easements, secs. 315, 317; Schmidt v. Quinn, 136 Mass. 575. (4) There is no evidence in this case showing an intention on the part of the common grantor to create a permanent easement of way over defendant's lot in favor of plaintiff's property, but any use of the said passageway was, to say the most, merely permissive.

Julius T. Muench for respondent.

(1) Where the owner of a heritage consisting of several parts has arranged and adapted these so that one derives a benefit or advantage from the other, of a continuous and obvious character, and he sells one part without making mention of such benefits or advantages, there is an implied understanding that they shall nevertheless continue, with respect to the various parts of the property, as before the separation of the title. Martin v. Murray, 221 Ill. 632; 14 Cyc. 166; Lampman v. Milks, 21 N. Y. 505; Overdeer v. Updegraff, 69 Pa. St. 110; Kieffer v. Imhoff, 26 Pa. St. 438; Huttemeier v. Albro, 18 N. Y. 48; Ins. Co. v. Patterson, 103 Ind. 582; Durel v. Boisblanc, 1 La. Ann. 407; Wrightsell v. Hale, 90 Tenn. 556; Goodall v. Godfrey, 53 Va. 219; Toothe v. Bryce, 50 N. J. Eq. 589; Goddard on Easements (Bennett's Am. Ed.), 119; Jones on Easements, sec. 154; Watts v. Kelson, 6 Ch. App. 166; Powers v. Hefterman, 233 Ill. 597; Hawkins v. Hendricks, 247 Ill. 521; Washburn on Ease-

ments and Servitudes (4 Ed.), 105; Gayette v. Bothune, 14 Mass. 49; Hall v. Morton, 125 Mo. App. 323. (2) The best considered cases hold that the easement need not be necessary, but merely convenient to the enjoyment of the dominant estate. See cases cited *supra*. (3) Authorities requiring the element of necessity in an easement by grant, nevertheless hold that a right of way by implication may attach to a part of the property, even where the way is not strictly one of necessity, provided it is reasonably necessary to the convenient enjoyment of the dominant part of the property. References as *supra*. Jones on Easements, secs. 145, 147, 154, 157.

GRAVES, P. J.—At one time the Connecticut Mutual Life Insurance Company was the owner of all the property discussed and involved in this suit. April 23, 1903, plaintiff acquired from said insurance company property described in the deed thus:

“A lot of ground in block number 1744 of said city of St. Louis, having a front of one hundred forty (140) feet and five (5) inches on the south side of Salisbury street by a depth of one hundred and twenty-five (125) feet to an alley fifteen (15) feet wide, and known as lots eight (8), nine (9), ten (10), eleven (11) and twelve (12) of Cope’s subdivision of said block 1744; together with the improvements on said lot 8.

“Subject to a lease to said second party, expiring May 1, 1907.”

Plaintiff at the time of the purchase was a tenant of the insurance company under a written lease which contained an option to purchase. In this lease, the lands are described thus:

“A lot of ground fronting one hundred and forty feet and five inches (140’ 5”) on the south line of Salisbury street in block number 1744 of the city of St. Louis, Missouri, being lots number 8, 9, 10, 11 and 12 in said block, together with a certain two-story brick

building known as numbers 2518 and 2520, Salisbury street, situated on said lot number 8."

In August, 1907, the defendant acquired by deed from the said insurance company, lands thus described:

"All of lots number five (5), six (6), and seven (7), of Cope's subdivision, in city block number 1744 of said city of St. Louis, having an aggregate frontage of seventy-nine (79') feet, six and one-half ($6\frac{1}{2}$ "') inches on the south line of Salisbury street, by a depth southwardly, between parallel lines, of one hundred and twenty-five (125') feet, more or less, to alley, together with all improvements thereon, known as numbers 2510, 2512, 2514 and 2516 Salisbury street. Bounded north by Salisbury street, south by alley, east by lot number 4 of said subdivision and block, and west by property now or formerly, of A. Bussmeyer."

The deeds from the insurance company to each of the parties contained the usual covenants of warranty. All the property fronted north on Salisbury street. The insurance company acquired title by a trustee's deed in November, 1877. On lot number 8, belonging to plaintiff, was a two-story brick building and there was likewise a two-story building on lot number 7, belonging to defendant. Lot number 8 lies to the west of lot number 7. Plaintiff by his petition avers:

"That the said land of the defendant and the said lot number 8 belonging to plaintiff are improved by two-story brick store and dwelling buildings. That the said buildings were erected by the predecessor in title of the said life insurance company, and said buildings are all attached. That the building upon plaintiff's said lot is numbered 2518 and 2520, Salisbury street. That between plaintiff's said building number 2518, Salisbury street and defendant's building number 2516, situated upon part of lot number 7, is a hallway four feet in width, the second story of said build-

ing number 2516, Salisbury street extending over and covering the said hallway, the joists of said building resting in the east wall of plaintiff's said building number 2518, Salisbury street. That for more than thirty years before the conveyance of the lots hereinbefore described to plaintiff, the said hallway between said buildings had been by the said Connecticut Mutual Life Insurance Company and its predecessors in title and by their tenants occupying the said building number 2518, Salisbury street, always used as an entrance to the rear portion of said lot and the second story of said building. That, during all of said time, the rear yards of the said buildings numbers 2516 and 2518, Salisbury street, were divided by a fence upon a line which was a prolongation of the western wall of said building number 2516, Salisbury street and the eastern line of said hallway, the said hallway and yard immediately back thereof being thus for more than thirty years before plaintiff acquired said property used in connection with the said building number 2518 Salisbury street. That the said hallway is the only means of ingress and egress to and from Salisbury street to the rear part of plaintiff's said lot and the second story of the said building number 2518, Salisbury street, except that the same might be reached by passing through the lower story of said building. That the said entrance to said property of plaintiff is and always has been a valuable adjunct and appurtenance to the said property. That by the manner of construction of said buildings and the use thereof by plaintiff's and defendant's predecessors in title, as aforesaid, the said former owners did impose upon the said lot number 7 now owned by defendant, to the extent that the same is occupied by said hallway, a servitude in favor of the said lot number 8 and the building thereon owned by plaintiff for the use of said hallway as an entrance to said lot number 8, as aforesaid, which easement and servitude passed to plaintiff by

the conveyance from said Connecticut Mutual Life Insurance Company to him as aforesaid. That said servitude was in effect at the time of the severance of ownership by the conveyance from the said Connecticut Mutual Life Insurance Company to plaintiff, as aforesaid. That the said use of said property was apparent, and defendant, who had occupied the said property now owned by him, as a tenant for some years before he purchased the same, was familiar therewith and acquiesced therein. That when defendant purchased said lots numbers 5, 6, and 7 from the said Connecticut Mutual Life Insurance Company as hereinbefore alleged, he took the same subject to the said easement and in all things fully recognized the same until on or about the 2d day of July, 1908, when defendant, against the protests of plaintiff, did forcibly remove the said fence and did erect a new fence extending back from the said building and coincident with the western line of said hallway, but did leave an opening or gateway in the said fence immediately next to plaintiff's rear wall, whereby entrance to defendant's yard from said hallway could be had. That defendant, on the 5th day of September, 1908, did, against the protest of plaintiff close the said opening by nailing boards across the same, whereby entrance to plaintiff's land from said hallway has been completely cut off, and refused, although requested so to do by plaintiff, to remove the said obstruction and allow plaintiff and his tenants the use of said hallway. That defendant threatens to keep the said fence closed and to wholly and forever deprive plaintiff and his family and tenants from using the said hallway as an entrance as aforesaid."

Prayer was for a mandatory injunction upon defendant to remove said obstruction, and to thereafter restrain defendant from obstructing said passageway, or denying to plaintiff the use thereof.

The answer makes many admissions and as it is not long had better be made a part of the statement. Such answer reads:

"Now comes the defendant in the above entitled cause, and for a return to the order to show cause why an injunction should not be granted as prayed for in plaintiff's petition, issued herein on the 8th day of September, 1908, states:

"1. Said petition does not state facts sufficient to constitute a cause of action against this defendant.

"2. That petition filed herein does not state facts sufficient to entitle plaintiff to the relief prayed for or for any relief in a court of equity.

"3. And for a further return to the order to show cause herein the defendant admits that plaintiff is, and at the times in said petition stated, was the owner of the following described real estate, to-wit:

"Lots numbers 8, 9, 10, 12 of Cope's subdivision of said city block number 1744 in said city and state, but denies that the same has a frontage of one hundred and forty feet and five inches (140' 5") on the south side of Salisbury street, but on the contrary states that it has a frontage of but one hundred and thirty-nine feet and ten inches (139' 10") on the south side of said street.

"Defendant further admits that the property was acquired by purchase from the Connecticut Mutual Life Insurance Company and under deed and duly recorded as set out in plaintiff's petition. Defendant further admits that he is, as set out, the owner of lots numbers 5, 6, 7 of said city block number 1744 and fronting seventy-nine feet, six and one-half inches (79' 6½") on Salisbury street, having likewise acquired the same from the said common grantor, the Connecticut Mutual Life Insurance Company under deed and duly recored as set out in plaintiff's petition.

"Defendant further admits that the said land of plaintiff and defendant is improved with a two-story

attached brick building as set out in plaintiff's petition, but denies that there is a hallway between said buildings of plaintiff and defendant as set out in plaintiff's petition, but on the contrary states that whatever hallway there may be on the said property, is a hallway through defendant's building and wholly lying upon defendant's property, and that plaintiff has no interest either by deed or by prescription or by any other title of any nature whatever in any such hallway or passage.

"Defendant further states that for a period of more than thirty years preceding the time at which plaintiff or defendant acquired title to the above described property both tracts were owned by the common grantor, the Connecticut Mutual Life Insurance Company, and that any use of said hallway by any tenants other than those of No. 2516 Salisbury street, the same being defendant's property, was permitted by the said Connecticut Mutual Life Insurance Company for its own benefit in renting to its tenants and that during all of said period the same was not used adversely to the said Connecticut Mutual Life Insurance Company. Defendant states that plaintiff holds title to the above described property by virtue of a warranty deed of the said Connecticut Mutual Life Insurance Company and that said deed carries with it no rights of any nature whatever in defendant's property, and that defendant's property is likewise secured from the said Connecticut Mutual Life Insurance Company by a warranty deed in fee simple, without any easement of any nature whatever in favor of plaintiff's property or any other property.

"Defendant further states that in any use of the aforesaid hallway by plaintiff that plaintiff has been a trespasser upon defendant's property and that said trespassing has become so frequent and of such a nature as to annoy defendant and to constitute itself a

nuisance; wherefore defendant closed said passage way and for the further reason that defendant desired to prevent plaintiff from acquiring a prescriptive right over defendant's property.

"Defendant further denies that said hallway was plaintiff's only entrance to Salisbury street, but on the contrary alleges that plaintiff has another and better entrance to Salisbury street through lot No. 9 of his own property to the same buiding.

"Defendant denies each and every allegation in said petition contained.

"Wherefore defendant having made full return to the order to show cause herein asks to be discharged with his costs."

Reply was general denial. Upon a hearing judgment went for plaintiff and the defendant has appealed. The evidence will be adverted to in the course of the opinion.

As will be observed by the pleadings many of the facts are admitted. The passageway or hallway in dispute is on Jablonsky's property. No contention is made to the contrary. The contention of the parties can at once be seen by short excerpts from statements of counsel in their briefs. Defendant's counsel thus outlines the case.

"We have nothing to do in this case with easements by prescription, or adverse user nor with easements by grant; nor with easements, made absolutely necessary by reason of no other access to the property; *on the contrary plaintiff claims an easement by reason of an alleged open, apparent, permanent way constructed by a common grantor, imposing upon one part of his property a burden in favor of another—which alleged open, apparent and permanent way, plaintiff claims has passed to him by a deed of the dominant property setting forth the dominant property by metes and bounds, not including the way.* The property claimed to be servient in this case was subse-

quently conveyed to defendant without mentioning the easement, and this action has been commenced against defendant to enjoin defendant from shutting off plaintiff from passing over the way claimed."

We have italicized the portion which states the case at bar.

Counsel for plaintiff concedes this to be a correct outline of the contention. He says:

"As the appellant properly states, the easement claimed here was not strictly one of necessity, but rather one rising from implication, because of the location and use of the hallway in controversy with reference to the various parts of the continuous row of buildings fronting on Salisbury street, owned, respectively, by the appellant and respondent, and which had been, previous to the acquisition of the property by them, owned, altogether, by the Connecticut Mutual Life Insurance Company. For this reason the exact situation and use of the various parts of the property before the present controversy arose is of the greatest importance."

Further on, the same counsel says:

"It is not claimed by us that, where there had been no prior usage, the easement would attach in favor of one part of property, sold by a common owner, as against another part sold to some other person, unless there was an absolute necessity for such easement. We do claim, however, that where, as in the case at bar, one part of the common property has been subject for a long time to a benefit or privilege enjoyed by the occupants of another part, and the whole property has been so improved as to indicate clearly that one part was to remain permanently subject to such benefit or privilege, this benefit or privilege becomes appurtenant to the part enjoying it and passes to a purchaser thereof, whether actually mentioned in the conveyance or not."

The evidence shows that the floor of the second story of Jablonsky's house extends over this hallway, the joists resting in the east wall of plaintiff's building. It also shows that originally a fence was run from the east side of this passage way to or toward the alley way in the rear of all this property. That through this fence was a gateway by which entrance could be made to the rear of Jablonsky's property. That there were two or more sheds on the rear of Jablonsky's property which were reached by going through this alleyway and the gate in this fence. That Bussmeyer had these sheds rented for some years and he and his tenants thus used this alleyway and this gate. The evidence also shows that this alleyway was used by Bussmeyer's tenants in coming from Salisbury street to the rear of the house on his said lot 8. This use, both as to the Bussmeyer property and the Jablonsky property, had continued for about thirty years. Under the evidence there is no dispute that Bussmeyer can reach his property through the alley in the rear. The property we speak of is an "L" to the building fronting on Salisbury street. There is no question that the property can likewise be reached from Salisbury street by passing over lot 9, which is a part of the Bussmeyer property. This lot is to the west of the brick building and is vacant. From the evidence Bussmeyer's tenants using the rear portion of his house sometimes entered in this way. There were three doors on the west side of the Bussmeyer building which opened out toward lot 9, which lot was vacant from Salisbury street on the north to the alleyway in the rear of all this property on the south. In his testimony Bussmeyer said:

"Mr. Carpenter: Along the west side of this property, along the west side of your property there. Now, how many doors are there along the west side of your building? A. One door going from my diningroom into the lot, what I call the lot, and then there

is another door between them two houses, and then a door from the saloon out. That is three doors.

"Q. Then you have three entrances out of your building onto lot 9 on the west? A. Yes.

"Q. And those three entrances could be used if you want to open them? A. *I can use them only on account of it is my own ground.*"

The last answer contains the milk in the cocoanut. He and his tenants could (and sometimes did) come from Salisbury street to his property by going over lot 9. He says that this could be done "*only on account of it is my ground.*" In other words he seeks to enforce an implied easement over Jablonsky's ground to keep from using his own. So that the question of necessity or even reasonable necessity is out of the case, and if that is a necessary element in an implied easement, then plaintiff's case must fail. We think the weight of authority requires at least a reasonable necessity to sustain an implied easement.

In other words, the facts of this case do not bring it within the generally accepted rule relating to dominant and servient estates. The evidence is at least lacking in the element of necessity or reasonable necessity.

In 14 Cyc. 1168, the rule as to necessity is thus stated: "All easements of whatever class which pass by implication or construction of law must not only be reasonably necessary and apparent, but also permanent in their character. A mere temporary provision or arrangement made for the convenience of the entire estate will not constitute that degree of necessity and permanency required to burden the property with a continuance of the same when divided or separated by conveyance to different parties. Three things are essential to the creation of an easement in this way: (1) A separation of the title; (2) that before the separation takes place the use which gives rise to the easement shall have been so long continued and so ob-

vious as to show that it was meant to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted or retained."

At page 1171, the same author says: "In some cases it is held that easements will not pass by implication except in cases of strict necessity. But the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made, not that it shall be absolutely necessary for the enjoyment of the estate granted."

Also bearing upon the question, the same authority at page 1173, thus speaks: "No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests in necessity not in convenience. It follows that a party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be. And the same is true where he has a prescriptive right of way over the land of another. A way of necessity is derived from the law and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant as they existed at the time of the conveyance."

In 10 Am. and Eng. Ency. Law (2 Ed.), 423, the rule is thus stated: "In some American jurisdictions, even where the distinction made by the English cases between implied grants and implied reservations is affirmed, the courts maintain that even when the quasi-dominant tenement is alienated, the alienee cannot claim an easement against the quasi-servient tenement except in a case of strict necessity. Other cases state that an easement by implied grant can arise only in cases of 'real necessity' or 'necessity;'

while the great body of authority is, as has been stated, to the effect that a 'reasonable necessity' is the proper standard. In estimating the degree of necessity as well as the presence of the other requisites for an implied grant, much depends upon the nature of the particular easement involved."

The English rule, spoken of above, is stated by the same authority at page 420 thus: "According to the established English doctrine, which is supported by some of the later American authorities, if the owner of both the quasi-dominant, and quasi-servient tenements conveys the former, reserving the latter, all such continuous and apparent quasi-easements as are reasonably necessary to the enjoyment of the property granted pass to the grantee, giving rise to easements by implied grant. If, on the other hand, the quasi-servient tenement is granted, while the quasi-dominant tenement is retained, no easement is reserved by implication, unless it is strictly necessary to the enjoyment of the property retained. These rules are founded on the principle that a grantor shall not derogate from his own grant."

Plaintiff contends for the doctrine announced in *Tooth v. Bryce*, 50 N. J. Eq. 589, wherein it is argued that the element of necessity is not necessary in an implied grant of an easement; that the easement passes with the dominant tenement as a part of the thing conveyed and without regard to the element of necessity. The chancellor in the *Tooth* case, *supra*, at page 608, states his view in this language: "It seems to me that the proper inquiry in such cases is whether the apparent and continuous easement in question forms a part of the tenement, and is beneficial to and adds to its value for use, and will continue to do so in the future. If it is, then the grantee is, upon plain principles, entitled to have it continued. He is entitled to enjoy the thing as it was when he bought it, with all its apparent appurtenances, if those apparent appur-

tenances are apparently permanent, and are useful and add to its value." The easement under discussion is stated by the chancellor. He says: "The complainant by his bill seeks to establish and protect his right to the benefit of a flow of water to his premises from the defendant's premises, through two several pipes laid underground and forced up by two hydraulic rams, situate, with the spring that drives them, on the defendant's premises."

The cases, as well as the text books, seem to emphasize the element of necessity in cases involving road or passage ways, more than in cases involving easements of a different character. The learned chancellor in the Toothe case, *supra*, undertakes to show that the element of necessity in implied easements through grants had its origin in the mistaken intermingling of the necessary elements of implied easements in cases where the dominant estate was not sold. The opinion is full of research and has been followed by some other cases, but is clearly not in line with the weight of authority.

In *Whiting v. Gaylord*, 66 Conn. l. c. 348, *ANDREWS, C. J.*, says:

"The cases in this country which have referred to *Pyer v. Carter*, 1 H. & N. 916, have none of them, so far as we can learn, ever followed it to its full extent. The American cases have with almost entire unanimity limited easements by implied grant to such as were open, visible—such as would be apparent to an ordinary visitor—continuous and necessary to the enjoyment of the estate granted or retained. [*Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Id. 366; *Philbrick v. Ewing*, 97 Mass. 133; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 Id. 349; *Henry v. Koch*, 80 Ky. 394; *Evans v. Dana*, 7 R. I. 306; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 Id. 564; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Warren v. Blake*, 54 Me. 276; *Janes v. Jenkins*,

34 Md. 1; Ingals v. Plamondon, 75 Ill. 118; Fetter v. Humphreys, 18 N. J. Eq. 263; S. C. 19 Id. 471; Denton v. Leddell, 23 Id. 67; Parsons v. Johnson, 68 N. Y. 62; Griffiths v. Morrison, 106 Id. 165; Root v. Wadhams, 107 Id. 384.]

“These cases differ considerably as to the degree of necessity which must exist in order to raise the implication that the easement or quasi-easement passes; but they all concur in the rule just stated, that it must be one which is open, visible and necessary.

“In this State the rule of construction, settled by a series of decisions, is that the subject-matter of a deed is to be ascertained from its premises, and that by a deed of land described as such, nothing passes except what is fairly included in the premises; that an easement not naturally and necessarily belonging to the premises will not pass.”

The Massachusetts court in *Buss v. Dyer*, 125 Mass. l. c. 290, says:

“We are aware that it has been held in some English cases that a deed of premises carries the right to continue to enjoy, as easements, all privileges or conveniences in and upon adjoining lands of the grantor, which were apparent, and had been used by the grantor in connection with the premises before the conveyance; that the conveyance is a conveyance of the premises ‘as they are.’ A leading case to this effect is *Pyer v. Carter*, 1 H. & N. 916. Similar doctrine has been held in New York. [*Lampman v. Milks*, 21 N. Y. 505.] We do not regard this as a correct view of the law.

“It is a well established and familiar rule that deeds are to be construed as meaning what the language in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing would be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against

incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the facts have been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed."

In *Stevens v. Orr*, 69 Me. l. c. 324, the court thus speaks: "The court is of the opinion that it must be regarded as the settled law of this State that the conveyance of a specified parcel of real estate, described by metes and bounds, will not carry with it a right of way over the grantor's adjoining land (although such way may be highly convenient, and apparent upon the face of the earth and in actual use at the time of the conveyance, and the deed contains the words 'with all the privileges and appurtenances'), unless such way is clearly necessary to the beneficial use and enjoyment of the estate conveyed. So held in *Warren v. Blake*, 54 Me. 276. And the same rule was applied to a drain in *Dolliff v. Boston & Maine R. R. Co.*, 68 Me. 173. We are aware of the conflicting state of the authorities upon this question. We have had occasion to examine them very fully on several occasions within the last few years. The leading cases are cited and commented upon in the case first above cited (*Warren v. Blake*), and it cannot be profitable to go over them again."

The rule has been consistently followed in that State. In the later case of *Stillwell v. Foster*, 80 Me. l. c. 333, the syllabus concisely states the case and the rule, and reads: "An owner of a building, containing two stores with partition wall between them, and with stairs on one side leading to second floor and a

door through the partition wall on second floor at head of the stairs, sold the store which had no stairs, and in the conveyance made the center line of the partition line the dividing line. Held, that the conveyance did not carry with it a right of way of necessity over the flight of stairs." In the course of the opinion, the court says: "The plaintiff claims title to a right of way over the stairs by virtue of an implied grant under the deed, Harlow to Wheelwright. He cannot claim it as a way of strict necessity, for his building fronts upon the highway, and he can make a stairway upon his own premises; but rather as a way of convenience; having been so built in the beginning and so occupied both before and after the conveyance to Wheelwright, it is claimed that it has become appurtenant to and so far a part of the premises, as to pass by the deed, if not by express grant at least by implication. But there is no obscurity in the language of the deed, no question as to the precise premises covered by it. The stairs are not conveyed even if considered a part of the premises, and the only question is whether, under the facts, a right of way over the stairs is conveyed by implication.

"In this State, the rule is now so well established that the test to be applied in such cases is whether the way is one of strict necessity, that it is too late to change it. Nor do we think it desirable, for it seems to be founded not only upon a preponderance of authority but upon sound principle. It has the recommendation of simplicity and certainty, is easily applied, and works no injustice; for, the purchaser knows, or should know, what he is buying before his deed is accepted. In *Warren v. Blake*, 54 Me. 276, this precise question was exhaustively examined and the rule adopted. In *Dolliff v. Boston & Maine Ry. Co.*, 68 Me. 173; and in *Stevens v. Orr*, 69 Me. 323, the question was raised and the rule affirmed."

In *Bonelli Bros. v. Blakemore*, 66 Miss. l. c. 143, that court said: "The owner of a tract of land, a part of which he afterwards grants to another, has not, of course, any easement in any part of his land while he owns the whole; he deals with it as owner and may subserve any portion to the use of the other, and may change the arrangement at his will; it is only where such arrangement is apparently permanent and intended so to be, and while so remaining the owner grants a part of the premises, that the question of easement or servitude can arise. The condition of the whole when the severance is made, the nature of the easement claimed to be granted or reserved by implication, its obviousness and continuousness, are the tests usually applied to determine the existence or non-existence of the grant or reservation. The rule seems to be of very general recognition that an easement not of strict necessity does not pass by implied grant, unless it be apparently permanent, obvious and continuous."

In *Spaulding v. Abbot*, 55 N. H. l. c. 426, the court says: "It is an elementary principle that whoever grants a thing is supposed tacitly to grant that without which the grant itself would be of no effect. [Broom's Maxims, 362.] But this applies only to such things as are incident to the grant, and directly necessary for the enjoyment of the thing granted. [Ib. 366.] It is implied that the grantor is the owner of such incidents as are directly necessary to the enjoyment of the grant, and has it in his power to convey them. If they are not his to convey, they cannot of course pass as an incident of the grant."

"The right to the use of this aqueduct is not either indispensable or necessary to the enjoyment of the premises conveyed, and the grant does not become ineffectual nor useless without it. It may be a great convenience to have it, and a great inconvenience to be

deprived of it; but that can have no legal effect upon the construction of this deed."

The Indiana court has the rule of "reasonable necessity." In *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. l. c. 587, that court says: "The application of the rule must depend upon the nature, arrangement and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use, the reasonable intentment of the parties; the underlying principle in such cases being that, included in the grant of the principal, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided."

To the point is *Valley Falls Co. v. Dolan*, 9 R. I. 489. The first syllabus states the ruling in the case and reads: "A right of way of necessity is founded upon an implied grant, and created by the necessity of its existence to the enjoyment of the estate granted. Convenience alone is not sufficient to raise the implication of a right of way."

In *Ogden v. Jennings*, 62 N. Y. l. c. 531, ALLEN, J., said: "Easements exist as appurtenant to a grant of lands, and as arising from implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication or as incident or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. When the necessity ceases, the rights resulting from it cease. It must be

an actual and a direct necessity. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incidents to the grant. In all cases the question of necessity controls."

In *Hall v. City of Austin*, 20 Tex. Civ. App. 1. c. 63, it is said: "We do not believe that there was any error in the peremptory instruction of the court upon this question. The doctrine of necessity means just what it says. The right to the road must arise by reason of the absolute necessities of the claimant; and the facts upon which this right may be made to depend must establish that the existence of the road is absolutely necessary as a means of ingress and egress to the plaintiff's premises. The right cannot rest upon any ground of convenience. And we believe that, upon this issue, the most that can be said of the evidence is that it established that it would put the plaintiffs to much expense and inconvenience to establish a road leading from their premises, connecting with other public roads, that would give him an outlet; and, as said in *Alley v. Carleton*, 29 Tex. 78: 'A way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication the right to pass over that of another to get to his own.'"

The West Virginia court, in *Standiford v. Goudy*, 6 W. Va. 1. c. 367, thus tersely speaks: "The count in question, however, indirectly alleges or indicates that while Woods owned the two adjoining tracts of lands, he had, appendant to the one, a way over the other. This is a contradiction. The absolute owner of both tracts cannot have an easement over the one appendant or appurtenant to the other. When the owner of two tracts of lands has used a way to and from one, over the other, no matter how long, and he grants the former tract without mention of any way, unless the way is necessary to the enjoyment of the

tract granted, the mere grant of the land does not create or confer a way appendant, appurtenant or in gross."

Washburn on Easements and Servitudes (4 Ed.), 107 thus states the rule: "It is generally held that an easement in order to pass by implied grant, must not only be apparent and continuous, but also necessary to the reasonable use and enjoyment of the granted premises. The test of such necessity is held to be the question whether the grantee might, at a reasonable expense, procure for himself an enjoyment of a similar easement. In some cases the question of necessity seems to be overlooked, and the main stress put upon the question whether the arrangement of dominant and servient tenements is such as to show that at the time of the sale the parties intended to transfer the easement in question."

To summarize the cases we at least have the rule of "reasonable necessity." So that from the greater number of the cases outside of Missouri "reasonable necessity" at least, is an element in an implied easement by grant. But we are not without some rulings in this State. Our cases we take next. We should remember that we are dealing with a case wherein the easement in question is a right of way over the property of another, and that in such cases the question of reasonable necessity should plainly appear.

In the case of *Barrett v. Bell*, 82 Mo. l. c. 114, this court adopted the rule announced in *Ogden v. Jennings*, 62 N. Y. 526. We there said: "In a well considered case in the Court of Appeals of New York, it was said: 'Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as incident or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the grant-

ed estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. . . . When the necessity ceases, the rights resulting from it cease. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls.' [Ogden v. Jennings, 62 N. Y. 526, 531, and cases cited, pp. 531, 532.] In a valuable work on Landlord and Tenant, the following is deduced as the rule: 'The true test as to whether a thing is an incident or appurtenance seems to be the propriety of relation between the principal and adjunct which is to be ascertained by considering whether they agree in nature and quality, so as to be capable of union without incongruity, and is actually and directly necessary to the full enjoyment of the property.' [Wood on Land. and Ten., sec. 213, pp. 310, 311, and note on page 312.] As the evidence in this case does not show the use of the kettle was a 'necessity' this fact deprives such use of the chief attributes of an appurtenance. 'It was a matter of ease and convenience only,' which having arisen by mere consent of parties, could be destroyed by withdrawing that consent at any time."

We again indorse the doctrine of the Ogden case, supra, in the later case of Mulrooney v. Obear, 171 Mo. l. c. 619, whereat this court said: "While the doctrine is broadly stated that 'the grant of a thing will include whatever the grantor has power to convey, which is reasonably necessary to the enjoyment of the thing granted,' it is not always easy to determine in a given case whether the thing under consideration is appurtenant or not. This court in Barrett v. Bell, 82 Mo. l. c. 114, quoted with approval the decision of the Court of Appeals of New York in Ogden v. Jennings, 62 N. Y. 526, in which it is said: 'Easements exist as

appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication or as incident or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. . . . A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls.' ”

In *Field v. Mark*, 125 Mo. l. c. 515, this court thus speaks: “Samuel Wilson conveyed each of these three twenty-foot lots facing on Laurel street by metes and bounds but makes no reference to any alley on the west. It must, then, in the outset be conceded that plaintiff’s right to this strip as an alley does not arise out of an express grant, or by necessary implication from the recitals in the deeds under which he claims. Nor do we think plaintiff can seriously claim that he is entitled to this alley as a way of necessity, which is itself an implication from the grant. That it would be a great convenience to these lots of plaintiff to have an alley in the rear is apparent, but it can hardly be said to be a necessity. Certainly it is not a necessity to the blacksmith shop. This twenty feet has a street in front and alley along its whole southern side, and the other two lots abut on the east on Laurel street. It is not enough that this alley would be even a great convenience; in the situation of this property it is not in the legal sense a way of necessity.”

It should be noted that the conveyance in this case is by metes and bounds and by platted lots, which is the same in legal effect. Discussing the difference between conveyances by metes and bounds and conveyances of a different character, in the case of *Warren v. Blake*, 54 Me. l. c. 286, the court said: “It is well

settled that an easement or right to use or occupy land, not within the lines given in a deed, may be claimed and held as a right, when the fee of the land does not pass. The question is, when and how far does that right become vested under such a deed? A distinction is made between a deed conveying in terms a particular house, or messuage or farm, known by a certain name, without defined limits, and a deed conveying a specific piece of land, carved out of a large piece, held by the grantors, and exactly described by metes and bounds. In the former case, where the grant is by name and not bounds, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under a grant of a piece of land by metes and bounds." In *Grant v. Chase*, 17 Mass. 443, l. c. 446, it is said: "This is a conveyance of a specific piece of land, carved out of a larger piece held by the grantor and described by metes and bounds. In such a case nothing could pass as parcel of the granted premises, but what is included within the boundaries expressed in the deed." Both of these cases and the doctrine thereof are cited with approval by this court in the case of *Field v. Mark*, 125 Mo. l. c. 515.

In the case at bar we can not hold that the right of way in question is one even of reasonable necessity. Lot 8 runs through from Salisbury street on the north to an open alley of 15 feet width on the south. Lot 8 therefore touches two public thoroughfares of the city. This alley way of 15 feet runs east and west through the entire block. In addition to this all this property on the rear of lot 8 can be and is reached over lot 9, a vacant lot, which lot 9 is a part of the property conveyed to plaintiff by the insurance company. Then further this passage way in dispute was in the first instance constructed for use in connection with lot 7 as much as it was for lot 8. It was so used for these years. It was a matter of convenience, not

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necessity or reasonable necessity, to either. The rear ends of both lots were touched by this fifteen foot alley.

Whether the rule be one of absolute necessity makes no difference under the facts of this case. It is apparent that the plaintiff is seeking to hold this passageway in order to keep from establishing one over lot 9 of his own property.

To our mind the evidence fails to make a case of an implied easement, and the judgment is reversed and cause remanded with directions to the trial court to enter judgment for the defendant. All concur.

JOHN C. BROWN and J. W. CHILTON, Appellants,
v. JOHN E. MARSHALL and MARTIN L.
CLARDY.

Division One, March 29, 1912.

1. **PROBATE COURT: Term: Alteration of Time.** Under the Laws of 1877, page 230, section 7, and the Revised Statutes of 1855, page 1601, section 9, the probate court of St. Louis county, at the June term, 1877, and on July 28th of that year, had express authority to make and enter of record an order changing the time for holding its stated terms, and to fix upon the second Monday in September and the first Mondays of December, March and June as the times for the beginning of the regular terms of the court.
2. ———: ———: ———: **Before Act of 1877 Went Into Effect.** Even if the order changing the times for the beginning of the terms of the probate court of St. Louis county, made on July 28, 1877, was made one day prior to the time the Act of 1877 went into effect, the Act of 1855 (R. S. 1855, p. 1601, sec. 9) was then in force, in almost the same words, and was ample authority for the order, since the Act of 1877 did not purport to repeal any of the Act of 1855 except "all acts and parts of acts inconsistent with this act," and there is nothing inconsistent between the two, and besides the Act of 1877 was but a continuation of the Act of 1855.
3. ———: ———: ———: ———: **Statutory Construction: Continuation of Existing Act.** A subsequent act repealing and reenacting at the same time a preexisting act is but a con-

tinuation of the latter, and the law dates from the passage of the first act and not from the date of the latter.

4. ———: ———: ———: By Probate Court of County of Terms of City Court: Separation. The separation of the city of St. Louis from the county of St. Louis in 1876 did not affect the origination, jurisdiction or location of the probate court of St. Louis county then existing. The probate court of St. Louis county had authority at its July term, 1877, to change the time for beginning the regular terms of the probate court of St. Louis city. That was not an attempt by one court to make an order changing the terms of another court. Prior to the division of the county into the city and county of St. Louis, the county seat, courts, offices and public buildings of the county of St. Louis were in the city of St. Louis, and those courts continued and remained in the city after the segregation of the present county; and the change from the probate court of the county of St. Louis to the probate court of the city of St. Louis was a change only in name, with the single exception that, after the Act of April, 1877, creating a probate court for the segregated county of St. Louis, the territorial jurisdiction of the city court was *pro tanto* curtailed. In all other respects it continued with the same officers, the same habitat and the same jurisdiction.
5. ADMINISTRATOR'S SALE: Of Real Estate to Pay Debts: Disapproved: Renewal of Order at Subsequent Term. Where a valid order to sell the real estate to pay decedent's debts has, after proper statutory notice to the heirs and parties interested has been given, been made, and the sale made in pursuance thereof has been disapproved because of the inadequacy of the price obtained, it is not necessary to the validity of a renewal order to sell that such renewal order be made at the same term, or that the heirs and interested parties be given further notice before the renewal order is made at a subsequent term. Whenever a party is duly summoned into court for a particular purpose he remains there until that purpose is finally accomplished or disposed of, or until he is otherwise discharged according to law.

Appeal from St. Louis City Circuit Court.—*Hon. C. C. Allen and Hon. Moses N. Sale*, Judges.

AFFIRMED.

Wilson Cramer for appellants.

(1) The order of publication by which the probate court of St. Louis city sought to obtain jurisdiction of the heirs of Lewis V. Bogy is void because it

was not made returnable to any time when the law required said court to be held, or provided that it might be held. The Act of 1877 definitely fixed the time for holding the terms of said court upon the second Mondays in February, May, August and November; whereas the order of publication was made returnable to the second Monday in September, 1878. Sec. 34, art. 6, Constitution; Laws 1877, p. 230, sec. 7; R. S. 1879, sec. 148; *Holladay v. Cooper*, 3 Mo. 156, 203; *Haws v. Clark*, 37 Iowa, 355; *Wade on Law of Notice*, sec. 1030. Such order of publication should have been made returnable on the first day of the next regular term of said court, as fixed by law, to-wit, the second Monday in August (or November), 1878. Sec. 34, art. 6, Constitution; Sec. 148, R. S. 1879. (2) The order of the probate court of St. Louis county changing the time for holding its terms of court did not authorize nor purport to authorize the probate court of the city of St. Louis to hold its terms of court at a time not authorized by law. Independent tribunals have no authority to manage the affairs of each other. Sec. 1, p. 1599, 2 R. S. 1855; Sec. 7, p. 230, Laws 1877. (3) The order of publication by which the probate court of St. Louis city sought to obtain jurisdiction of the heirs of Lewis V. Bogy was void also because not made at any regular, special or adjourned term of said court, and because it was made at a time when the said court was not, and could not be, in lawful session. Sec. 34, art. 6, Constitution; Laws 1877, sec. 7, p. 230. (4) The laws of 1877, creating the probate court of the city of St. Louis, did not take effect until July 29, 1877 (ninety days after the adjournment of the 29th General Assembly on April 30, 1877); therefore the order made by the probate court of St. Louis county on July 28, 1877, could not by any possibility have the effect to change the times as fixed by law for holding the terms of the probate court of St. Louis city, and did not authorize the probate court of St.

Louis city to hold its terms of court at a date differing from that fixed by law. (5) In a proceeding to sell the lands of a decedent to pay his debts notice to his heirs is a jurisdictional prerequisite, and an order of sale of lands made without jurisdiction of the heirs is void, and as clearly "without due process of law" as are the judgments of any other courts of record rendered without jurisdiction of the defendants therein. *Valle v. Fleming*, 19 Mo. 454; *Young v. Downey*, 145 Mo. 258, 332; *Hutchinson v. Shelly*, 133 Mo. 412. And such judgment may be overthrown in collateral attack by introducing return or notice showing invalid service. *Davis v. Montgomery*, 205 Mo. 271; *Feurt v. Caster*, 174 Mo. 290; *Stark v. Kirchengraber*, 186 Mo. 646; *Des Loge v. Tucker*, 196 Mo. 601; *Kelly v. Murdough*, 184 Mo. 377. (6) Constructive service must always be had according to the method pointed out by statute, and is strictly construed. *Wade on Law of Notice*, sec. 1030; *Young v. Downey*, 150 Mo. 326; *Harness v. Cravens*, 126 Mo. 252; *Lumber Co. v. McCabe*, 220 Mo. 177; *Williams v. Monroe*, 125 Mo. 574; *Ohlman v. Mill Co.*, 222 Mo. 62. (7) The probate court of the city of St. Louis, having no authority of law to hold a term of court on the second Monday of September, 1878, at which time the original order of sale was made under which respondents claim title, and having no authority to hold a term of court on the second Monday in September, 1881, at which time the renewed order of sale was made, the said orders of sale, made at said dates, were *coram non judice* and utterly void; and the administrator's deeds made thereunder are likewise absolute nullities. *State ex rel. v. Ross*, 118 Mo. 23; *Williams v. Monroe*, 125 Mo. 581; *Doss v. Waggoner*, 3 Tex. 576; *Brumley v. State*, 20 Ark. 78; *Garlick v. Dunn*, 42 Ala. 404; *Wightman v. Karsner*, 20 Ala. 446; *Norwood v. Kenfield*, 34 Cal. 329; *Francis v. Wells*, 4 Colo. 274; *Austin v. Searing*, 16 N. Y. 112; *Kleber's Void Judicial Sales*,

sec. 142, p. 139; 8 Am. & Eng. Ency. Law, 24, 29; 11 Cyc. 728, 727; Robinson v. Ferguson, 78 Ill. 528. (8) The first sale of the lands in controversy by the administrator, having been disapproved by the probate court, the order to sell could have been renewed by the probate court at the same term at which the same was disapproved while the heirs were presumed by law to be present in court, but as this was not done, and as the heirs of Bogy did not appear in court and did not ratify the proceedings in any manner, the renewed order of sale, upon which respondents' claim is based, made nearly a year after the sale was disapproved, was void for want of jurisdiction. Sec. 168, R. S. 1879; George v. Middough, 62 Mo. 549; State v. Walbridge, 119 Mo. 394; Koch v. Hawkins, 40 Mo. App. 680; Ault v. Bradley, 191 Mo. 729.

N. A. Mozley and Charles W. Bates for respondents.

(1) The separation of the city and county of St. Louis in 1876—the division of the old county of St. Louis—did not affect the organization or jurisdiction or location of the probate court of the county of St. Louis established in St. Louis. Constitution, art. 9, secs. 20, 23, 24; Constitution, art. 6, sec. 34; Constitution; art. 14, sec. 5; Schedule, sec. 3; R. S. 1855, p. 1599, being sec. 1, Act of Dec. 2, 1855; Scheme, secs. 1, 3, 5, 10; Henderson v. Koenig, 168 Mo. 356; Ex parte Buckner, 9 Mo. App. 540; State ex rel. v. Finn, 4 Mo. App. 347; State ex rel. v. Mason, 4 Mo. App. 377; State ex rel. v. Finn, 8 Mo. App. 341; State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Laughlin, 75 Mo. 147; Eicherlmann v. Weiss, 7 Mo. App. 87; Cunningham v. St. Louis, 96 Mo. 53; Babcock v. Hahn, 175 Mo. 136; State ex rel. v. Railroad, 195 Mo. 228.

(2) The probate court of the old county of St. Louis, located in the city of St. Louis since 1841, was not abolished by the act of 1877, nor was it moved. That

act simply created a new court for the new county of St. Louis, as distinguished from the city of St. Louis. Constitution, art. 6, sec. 34; Constitution, art. 9, sec. 24; Constitution, art. 14, sec. 5; Schedule, sec. 3; Laws 1877, p. 229, sec. 18; *State ex rel. v. Gammon*, 73 Mo. 421; *Babcock v. Hahn*, 175 Mo. 136; *State ex rel. v. Laughlin*, 75 Mo. 147; *Henderson v. Koenig*, 168 Mo. 356; *Eicherlmann v. Weiss*, 7 Mo. App. 87; *State ex rel. v. Finn*, 8 Mo. App. 341; *State ex rel. v. Walsh*, 69 Mo. 408; *Cunningham v. St. Louis*, 96 Mo. 53. (3) The terms of the probate court, fixed by order of the court, are legal terms of court. The probate court had the power, under the statutes, to change the time for the terms of court from the dates fixed by the statute to those fixed by the court to meet the convenience of the court and the public. *Rhodes v. Bell*, 230 Mo. 138; *Overton v. Johnson*, 17 Mo. 451. (4) The provisions of the act of 1877, relating to terms of probate courts, did not repeal the same provisions of the statutes as they then existed, but were continuations of such provisions and did not invalidate the action of the court in fixing its terms. *State ex rel. v. Mason*, 153 Mo. 23; *State ex rel. v. Court*, 53 Mo. 128; *Smith v. People*, 47 N. Y. 330. (5) The probate court having acquired jurisdiction to make the original order of sale, the renewal order of sale without further notice and at any subsequent term was valid. *Rhodes v. Bell*, 230 Mo. 138; *Rogers v. Johnson*, 125 Mo. 214; *Sims v. Gray*, 66 Mo. 616; *Stowe v. Bank*, 123 Mo. 672; *Greffett v. Williams*, 114 Mo. 181. (6) Judge Woerner was elected at the general election in 1876 under the act of 1855 for a term of six years and was, by the constitutional provisions and by the scheme of separation of the city and county of St. Louis and by the act of 1877, expressly continued in the office of judge of the probate court, to which he was then elected to the expiration of his six-year term. Constitution, art. 9, sec. 24; Constitution, art. 14,

sec. 5; Act of 1877, sec. 18; State ex rel. v. Gammon, 73 Mo. 421. (7) The acts of the probate court are entitled to the same presumptions of validity as those of any other court of record or of any court of general jurisdiction. Covington v. Chamblin, 156 Mo. 574; Camden v. Plain, 91 Mo. 117; Bray v. Adams, 114 Mo. 486; Wolf v. Robinson, 20 Mo. 459; Nolan v. Barrett, 122 Mo. 181; Rugle v. Webster, 55 Mo. 246; Hughes v. McDavitt, 102 Mo. 77; Price v. Real Estate Ass'n, 101 Mo. 114; Woerner on Am. Law of Administration, secs. 144, 145; Rogers v. Johnson, 125 Mo. 215.

Wilson Cramer for appellant in reply.

(1) The city of St. Louis was a new political subdivision of the State carved out of St. Louis county, created by the adoption of the scheme and charter in 1876, and the residue of the county remained a legal county of the State under the name of the county of St. Louis. Sec. 23, art. 9, Constitution of 1875; State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Mason, 4 Mo. App. 377; People v. Morrell, 21 Wend. (N. Y.) 563; State ex rel. v. Walker, 17 Ohio, 135; State ex rel. v. Choate, 11 Ohio, 511; Mauck v. Lock, 70 Iowa, 266; School Dist. v. Wolf, 20 L. R. A. 358.

(2) The probate court of St. Louis city was not a continuation of the probate court of St. Louis county, but was a new court created by the act of 1877. State ex rel. v. Walsh, 69 Mo. 408; People v. Morrell, 21 Wend. (N. Y.) 563; Sec. 23, art. 9, Constitution of 1875; Sec. 1, Laws 1877, p. 229; County v. Albany, 92 U. S. 307. (3) Sec. 18, Laws 1877, p. 231, providing that all probate judges and ex-officio probate judges should continue in office and discharge all duties of probate judges until the expiration of the terms for which they were elected, taken in its most favorable aspect to respondents' contention, could be made to apply only to offices in existence at the time such act was passed, and could not be made to apply to offices

not theretofore in existence. References as under points 1 and 2. (4) Said Sec. 18, Laws 1877, did not authorize a probate judge thereby continued in a pre-existing office to usurp or perform the duties of a different office, and said act could give to Judge Woerner, as a *de facto* judge of the court, whose functions he had assumed by usurpation, no greater powers than the law conferred upon the office, or would have conferred upon any lawful incumbent thereof. See authorities under points 1 and 2. (5) The constitutional provision, sec. 24 of art. 9, providing that courts of record then in existence were to continue to exercise their territorial jurisdictions as then exercised, "until otherwise provided by law," was fully met, satisfied and ended by the act of 1877 creating a probate court for the city of St. Louis. Laws 1877, sec. 1, p. 229; State ex rel. v. McMillan, 108 Mo. 153. (6) Neither courts nor individuals have the power to take any action looking either to the annulment or putting into effect the provisions of a statute before the date that such statute takes effect as a completed law. Lewis & Sutherland's Stat. Const., sec. 182, p. 323; St. Louis v. Alexander, 23 Mo. 520; Keane v. Cushing, 15 Mo. App. 96; State v. Field, 17 Mo. 529; State v. Railroad, 31 Ark. 701; People v. McDougale, 6 Cal. 673. (7) The appellate courts will take judicial notice of the dates when regular terms of inferior courts are held, when and only when such terms are held upon dates fixed by law, which is nothing more than the taking of judicial notice of a public law. Hadley v. Bernero, 97 Mo. App. 319; Harwood v. Toms, 130 Mo. 225; Wade on Law of Notice, sec. 1414.

WOODSON, J.—This suit was instituted March 18, 1907, in the circuit court of Stoddard county, by the plaintiffs against the defendants, under section 650, Revised Statutes 1899, now section 2535, Revised Statutes 1909, to ascertain and determine the interests

of and to quiet the title of the parties to some 4400 acres of land situated in said county, particularly described in the pleadings. Afterwards a change of venue was awarded to the circuit court of the City of St. Louis, where a trial was had, which resulted in a judgment in favor of the defendants, from which the plaintiffs duly appealed to this court.

It was agreed that Lewis V. Bogy was the common source of title. The plaintiffs claim title to the lands in controversy by regular quitclaim deeds from his heirs dated September 18, 1905, and the defendants claim title thereto through mesne conveyances from said Bogy under an administrator's deed made and executed by the administrator of his estate, in pursuance to orders of the probate court of St. Louis county, now the city of St. Louis, dated March 11, 1882.

Since no question is raised as to the sufficiency of the pleadings they will be put aside without further notice, excepting we will here state that they are sufficient to embrace every question which will be discussed in this opinion.

As to the facts: Lewis V. Bogy, the common source of title, resided in the city of St. Louis, and died there intestate in the year of 1877, owning the land in controversy, as well as other lands in Stoddard county; leaving surviving him his widow, Pelagie Bogy, Joseph Bogy, his son, and Josephine Noonan, his daughter.

The heirs of Lewis V. Bogy, having waived their right to administer upon his estate, the probate court appointed Samuel N. Holliday administrator thereof. He duly qualified as such and entered upon the discharge of his duties as such.

The assets of the estate were duly inventoried and appraised by the administrator, as required by law, and claims to the amount of about \$200,000 were duly allowed against it, which showed that the estate was

hopelessly insolvent, the indebtedness exceeding the assets by about \$185,000.

The St. Louis County Probate Court opened its June term, 1877, at the city of St. Louis on the first Monday, being the 4th day of June, of that year, and there were present Honorable J. Gabriel Woerner, judge; William E. Wagner, clerk; and Isaac N. Mason, marshal. During the same term and on the 28th day of July, 1877, the following order was made and entered of record by the court:

"It is ordered by the court that hereafter the regular terms thereof shall begin on the second Monday of September, and on the first Mondays of December, March and June of each year, instead of the time now provided by law, and that notice of such change of time be published in each of the daily newspapers published in the city of St. Louis, and also by posting such notice in some conspicuous place in the clerk's office and court room.

"J. G. WOERNER, Judge."

"The next record referred to is that of the probate court of the city of St. Louis, opening its September (1877) term, whereby it is shown that the September (1877) term was begun and held in the city of St. Louis on the second Monday, being the 10th day, of September, 1877, and that there were present the same officers of the court before mentioned.

"The next record in order of time is the declination to administer and request for the appointment of Samuel N. Holliday as administrator of the estate of Lewis V. Bogy. This declination and request was dated October 23, 1877, and was signed by Pelagie Bogy, widow; Joseph Bogy, son; and Josephine Noonan, daughter, and Thos. S. Noonan, her husband, designating themselves in the body as widow and heirs-at-law of Lewis V. Bogy, deceased.

"At the June term, 1878, of the probate court of the city of St. Louis, the administrator, Samuel N.

Holliday, filed a petition asking for an order of sale of the lands of the estate of Lewis V. Bogy, deceased, or so much as may be necessary to pay the debts of the estate of the deceased, stating that the personalty was not sufficient for that purpose, and describing the lands of the estate, including the land involved in this controversy, and was accompanied by the lists and inventories previously mentioned."

The order of publication is as follows (formal parts omitted):

"In the probate court for the city of St. Louis, June term, 1878. Saturday, July 20, A. D. 1878.

"ORDER OF PUBLICATION.

"ESTATE OF LOUIS V. BOGY.

"Now at this day comes Samuel N. Holliday, administrator of the estate of Lewis V. Bogy, deceased, and presents to the court his petition praying for an order for the sale of so much of the real estate of said deceased as will pay and satisfy the remaining debts due by said estate, and yet unpaid for want of sufficient assets, accompanied by the accounts, lists and inventories required by law in such case; on examination whereof, it is ordered that all persons interested in the estate of said deceased be notified that application, as aforesaid, has been made, and that unless the contrary be shown on or before the first day of the next term of this court, to be begun and held at the city of St. Louis, within and for the city of St. Louis, on the second Monday of September, next, an order will be made for the sale of the whole, or so much of the real estate of said deceased as will be sufficient for the payment of said debts; and it is further ordered that a copy hereof be published in some newspaper printed in the city of St. Louis, aforesaid, for four weeks before the next term."

The original order of sale was duly made at the September term, 1878, of the probate court of the city

of St. Louis, on the 26th day of October, 1878, and finds due publication of the notice to those interested in the estate upon the order of the last June term of said court, and finds not sufficient personal assets to pay the debts of said estate; describes the lands, directs the appraisement before sale, and directs the sale thereof or so much of them as necessary to pay the debts, at private sale.

At the September term, 1880, and on the 18th day of October, 1880, the administrator petitioned the court for a renewal order of sale, stating that he had been unable to make any sales under the order theretofore made. Upon this petition, and on the same day, the court made a renewal order of sale, at public or private sale, describing the land.

At the December term, 1880, of the court, and on the 6th day of December, 1880, the administrator reported the sale of lands of said estate, stating the lands did not sell for their value and that to confirm the sales would be disadvantageous to the estate. At the said December term, and on the 18th day of December, 1880, the probate court disapproved of the sales so reported by the administrator.

At the September term, 1881, and on the 20th day of October of that year, the administrator petitioned the court for a renewed order of sale, at public or private sale, of the lands belonging to the estate of Lewis V. Bogy, deceased. At said term and on October 20, 1881, the court made a renewal order of sale of the lands of said estate, finding in said order that the prior order of the September term, 1880, had not been executed. This order correctly describes the property, and is in the usual form.

The records further show that the administrator made annual reports at the December term in the year 1881 and 1882.

At the March term, 1882, of the probate court, and on March 6, 1882, the administrator made a report

to the court of his sales, describing the land sold, among which was the land in controversy, reciting the names of the purchasers and the prices obtained for the land. He further recites that the sales were made at public auction, after the same had been duly appraised, and after the appraisement, and that the dower interest of the widow was included in the sales, she having made a quitclaim deed.

At the same term, and on March 11, 1882, the court approved the sales of the lands, including the land in controversy, to those under whom respondents claim, and recites that the sale was made under and by virtue of the renewed order of sale, made at the September term, 1881, of the court, and directed that the sales made be ratified and confirmed. The order further recites that a commissioner was appointed to ascertain and set out the widow's dower interest in the proceeds of the sales.

At the December term, 1882, and on December 11, 1882, the administrator filed his final settlement.

The final settlement recites the sales of the real estate, giving the names of the purchasers and the amounts, and recites the reception by the administrator of the proceeds of these sales, including the lands in controversy, and showing the payment to the widow of her dower interest in the proceeds of the sale of the lands, showing cash in hand for distribution among creditors, \$8886.62; setting out the items of personal estate, other than money, still on hand, face value, \$21,550; setting forth the claims allowed against the estate, amounting to \$186,914.62. The report states that the personal estate is of little value, consisting mostly of stocks, and asking an order to sell the same.

It shows allowed debts against the estate unpaid to the amount of \$82,382.36.

At this December term, 1882, and on the 11th day of December, 1882, the probate court made an order

reciting the filing of the final settlement, duly verified by affidavit, together with the proof of publication of notice given by the administrator, as required by law, of his intention to make such settlement, and found the amount of cash on hand and the par value of other personal property as stated in said settlement, directed the administrator to pay a 4.7 per cent dividend on fifth-class demands, with interest accrued thereon amounting to the sum of \$186,914.62, and ordered the administrator to sell for cash at public sale the stocks and claims, being the personal property still remaining on hand, after giving notice, etc., and report his proceedings thereunder to the court at the next March term thereof, to which it is ordered that the final settlement be and is hereby continued.

At the June term, 1883, the administrator filed his report of the sale of the personal property, showing the aggregate of the prices which the personalty brought at the sale, to be twenty-eight dollars and twenty cents, twenty-one dollars of which was stated in the report to be uncollectible by reason of the fact that the item purchased for that amount, being a claim for damages, was not assignable.

At the September term, 1892, and on October 7, 1892, the administrator filed his final settlement and receipts, showing the disbursements, together with proof of publication of notice given by him as required by law and his intention to make such settlement, and the same day the court made an order, finding due publication of notice of said settlement and that the administrator had a balance in his hands, belonging to said estate, of \$673.35, and the court further found that more than two years having elapsed since the date of granting letters of administration of said estate, it was ordered that the administrator pay 427-1000 per cent on all demands of the fifth class.

The notice of said final settlement was also of-

ferred in evidence, showing due publication of notice to the September term, 1892.

At the December term, 1893, and on January 19, 1894, the court entered an order finding that the administrator had filed in court receipts for the amounts ordered to be paid by him in final settlement of said estate and ordered that he be now finally discharged as such administrator.

Adolph Lackman, a deputy clerk in the probate court, called by appellants, testified that the records of the proceedings of the probate court, of the county of St. Louis, had down to July 28, 1877, are kept in the courthouse of the city of St. Louis.

Respondents and those under whom they claim have paid all the taxes of every kind assessed against the land ever since it was sold by the administrator.

John E. Marshall, one of the respondents, called by the respondents, stated that he bought the lands in controversy about 1902 and paid from one dollar and a half to two dollars per acre, at which time the market value was about one dollar and a half an acre, but which now are worth about fifteen or twenty dollars an acre. The price immediately went up after the Simpson case was decided by the Supreme Court in 1903 (which case decided adversely to the claim of Stoddard county to the lands and in favor of the private ownership); that he took charge of the lands and managed them for himself and Mr. Clardy and assisted in the drainage in that county; was one of the commissioners in the formation of drainage districts, and also sold some of the lands; has paid special drainage assessments upon these lands, which are located in the drainage districts; devoted time to the organization of several drainage districts and was commissioner in some of them and did work about the preliminary matters in relation to the organization of a large drainage district, covering several counties;

has other lands, affected by the Little River Drainage District, which is the drainage district covering several counties; paid his own expenses in attending to these matters. Several ditches drained the lands and made them fit for clearing and cultivation; some of these ditches are not yet completed. After the decision of the Ringen title everybody that owned land down there began to improve it and were convinced that it was feasible to drain that country, proceeded to do so, and the values everywhere began at that time to increase and the people went right on and worked in harmony together. He received no compensation for serving on the committees in regard to these drainage matters and no allowance was made him. He, with others, procured the passage of a bill improving upon the Indiana drainage laws for the redeeming of this land, and when that bill was passed they proceeded with the drainage proposition and have been at it ever since. The drainage taxes run from fifty cents to four dollars an acre according to the benefits.

Counsel for the appellants states in his brief that "the validity or invalidity of the administrator's sales of the land in controversy, and the deeds based on said sales under which respondents claim the land, is the sole and only issue in this appeal."

After a careful consideration of the record and able briefs of counsel filed in the cause, we are of the opinion that the only issue here involved is correctly stated by counsel in the language just quoted.

He goes further, however, and assigns many reasons in support of his contention that said sales and deeds are void, the first being that "the order of publication by which the probate court of St. Louis city sought to obtain jurisdiction of the heirs of Lewis V. Bogy is void, because it was not made returnable to any time when the law required said court to be held or provided that it might be held. The Session Acts

of 1877 definitely fixed the time for holding the terms of said court upon second Mondays in February, May, August and November; whereas the order of publication was made returnable to the second Monday in September, 1878."

In support of this contention, counsel for appellants cite section 34, article 6, of the Constitution of Missouri; Laws 1877, section 7, page 230; section 148, Revised Statutes 1879; Holliday v. Cooper, 3 Mo. 286; Haws v. Clark, 37 Iowa, 355; Calkins v. Miller, 55 Neb. 601; Wade on Law of Notice, section 1030.

Said section 34 of article 6 of the Constitution reads as follows: "Sec. 34. The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians and the sale or leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: Provided, That until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law."

Said section 7 of the Laws of 1877 prescribes the number and times for holding the terms of the probate courts of the State. It reads as follows:

"Said courts shall hold four terms annually, commencing on the second Monday of February, May, August and November, and may hold special and adjourned terms at any time when required: Provided, however, That in all counties in which courts for the transaction of probate business are now held in more

than one place, then in such cases courts shall be held at the times and places now designated or provided by law. Said courts may alter the time for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient."

Said section 148, Revised Statutes 1879, provides for notice to be given to all persons interested in real estate when application is made to the probate court for an order to sell it to pay debts. It reads as follows:

"When such petition, and such accounts, lists and inventories, shall be filed, the court shall order that all persons interested in the estate be notified thereof, and that unless the contrary be shown, on the first day of the next term of the court, an order will be made for the sale of the whole, or so much of such real estate as will pay the debts of the deceased. Such notice shall be published for four weeks, in some newspaper in the county in which proceedings are had, or by ten handbills, to be put up at ten public places in said county, at least twenty days before the term of the court at which any such order will be made, in the discretion of the court."

The case of *Holliday v. Cooper*, *supra*, holds, as stated in the syllabus, that: "Where a writ is made returnable to no term known to the law of the land, but to some day not the commencement of a term, appearance and pleading will not cure the defect in the writ."

The remaining authorities cited are of similar import to the last one considered.

Now as to the application of these authorities to the facts of this case. It will be remembered that at the June term, 1878, of the probate court of the city of St. Louis, the administrator filed his petition asking for an order of court to sell the lands of the estate to pay debts, and that during the same term, and on July 20, 1878, the court made the order of publication heretofore copied, notifying the interested

parties of said application for an order to sell the real estate to pay debts, etc.

This order for publication was duly published; and thereafter, at the September term, 1878, of the said court, and on the 26th day of October of that year, the order of sale was duly made and entered of record. Then follow the various other orders heretofore mentioned.

From this recitation of the facts it will be seen that the heirs of Lewis V. Bogy, according to this order of publication, were not ordered to appear at the February, May, August or November term of said court, to show cause why the lands should not be sold to pay debts, as provided for by said section 7 of page 230, Laws 1877, and section 148, Revised Statutes 1879, heretofore copied, but were, as previously stated, ordered to appear at the September term, 1878, thereof.

Upon that showing counsel for the appellants contend that under the authority of *Holliday v. Cooper*, *supra*, the heirs of Lewis V. Bogy were not legally required, nor were they under any legal obligation, to appear at the September term, 1878, or at any other time to show cause, etc., for the reason that the order of publication was void and of no force or effect and did not constitute a legal notice to them.

If that was all the law that we have bearing upon that question, then there would be no question but what the position taken by counsel for appellants would be sound and unanswerable; but unfortunately for them that is not all the law we have which is applicable to the case, as will presently appear.

Section 9, page 1601, Revised Statutes 1855, of "An Act Establishing a Probate Court in St. Louis County, and For Other Purposes," approved December 12, 1855, reads as follows: "Said court shall be held on the first Mondays of March, June, September, and December in each year; but it may alter the time

of holding its stated terms, giving notice thereof in such manner as the judge shall deem expedient; and it may hold adjourned terms."

And it should be remembered that section 7 of Laws 1877, page 230, before copied, expressly provides that the probate courts of the various counties of the State "may alter the time for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient;" and by consulting the statement of the case previously made, it will be seen that Judge WOERNER, at the June term, 1877, of the St. Louis county probate court, and on the 28th day of July, of that year, made and entered of record an order fixing the regular terms of said court to begin on the second Monday of September, and on the first Mondays of December, March and June of each year.

Since said order of publication was made returnable to the September term, 1878, of the probate court of St. Louis county; and since the court had fixed the second Monday in September as one of its regular annual terms, it would seem, in the absence of other controlling matters, that the order of publication returnable to the September term, 1877, would be sufficient notice to the heirs of Louis V. Bogy, to bring them into court at the said September term.

In opposition to that proposition, counsel for appellants insist that said order of the probate court of St. Louis county, made on July 28th, during the June term, 1878, thereof, fixing the second Monday in September and the first Mondays in December, March and June of each year, is void and of no effect for two reasons: first, because said order was made by the probate court of St. Louis county, and not by the probate court of the city of St. Louis, the terms of which, it is contended, the order purported to change, or in other words, the former court had no authority

by order, or otherwise, to change the terms of the latter court; and, second: because "The laws of 1877 creating the probate court of the city of St. Louis, did not take effect until July 29, 1877 (ninety days after the adjournment of the 29th General Assembly of Missouri, on April 30, 1877); therefore the order made by the probate court of St. Louis county on July 28, 1877, could not by any possibility have the effect to change the times as fixed by law for holding the terms of the probate court of St. Louis city, and did not authorize the probate court of St. Louis city to hold its terms of court at a date different from that fixed by law."

We will consider those two questions in the inverse order stated, for the reason that so far we have been dealing with the latter.

Conceding that the Act of 1877, did not go into effect until July 29, 1877 (which seems to be correct), one day prior to the date of the order of the probate court of St. Louis county fixing the stated terms thereof on the second Monday in September and the first Mondays in December, March and June of each year, nevertheless said section 9, page 1601, Revised Statutes 1855, was in full force and effect at the time the Act of 1877 became a law, which was, as before stated, July 29, one day subsequent to the date of the order so fixing the terms of the court. Not only was said order of July 28th fixing said terms valid when made, but it remained so during the entire period covering the administration of Lewis V. Bogy's estate. This is true because the Act of 1877 only purported to repeal (quoting), "all acts and parts of acts inconsistent with this act." [See section 20 of that act.]

Clearly there was nothing inconsistent between section 9 of the Act of 1855, and section 7 of the Act of 1877, both of which have been previously quoted. Each in express terms and almost in the same lan-

guage authorize the various probate courts of the State, by order, to change the stated terms thereof, to such times as the judges thereof may deem best and most convenient for the transaction of the business therein.

But independent of that, there is another sound rule of statutory construction which governs this case, and that is, a subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. [State ex rel. v. Mason, 153 Mo. 23, l. c. 58-59; State ex rel. v. County Court, 53 Mo. 128, l. c. 129-130; Smith v. People, 47 N. Y. 330.]

We therefore rule this contention against the appellants.

Attending the second contention of counsel before mentioned, namely, that the order of the probate court of St. Louis county, the court which appointed the administrator of the estate of Bogy, and which made the order of July 28, 1877, changing the terms of the probate court of the city of St. Louis, is void for the reason that one court cannot make a valid order changing the terms of another court.

As an abstract legal proposition, there can be no question but what this contention is sound and unanswerable; but the trouble with that rule is, it does not apply to the facts of this case. Counsel for appellants erroneously assume that the probate court of St. Louis county made an order changing the terms of another and different court, namely, the probate court of the city of St. Louis. In other words, counsel erroneously assume that the probate court of St. Louis county, which existed prior to the separation of the city of St. Louis in 1876 from the county of St. Louis, thereafter, under the law of the separation, became the probate court of the new St. Louis county, and that a new and different probate court was subsequently created by the Legislature for the city of St. Louis.

The fact is the separation of the city of St. Louis in 1876 from the county of St. Louis did not affect the organization, jurisdiction or location of the probate court of the county of St. Louis, established in St. Louis by an act of the Legislature in 1840 (Laws 1840, p. 54), which is substantially the same as the Act of 1855 before mentioned.

This proposition is fully sustained by the following authorities, viz.: Secs. 20, 23 and 24 of article 4 of the Constitution; Sec. 34 of article 6, Constitution; Section 5 of article 14, Constitution; Schedule, section 3, thereof; Section 1, page 1599, R. S. 1855; Scheme, Sections 1, 3, 5 and 10; *Henderson v. Koenig*, 168 Mo. 356; *Ex parte Buckner*, 9 Mo. App. 540; *State ex rel. v. Finn*, 4 Mo. App. 347; *State ex rel. v. Mason*, 4 Mo. App. 377; *State ex rel. v. Finn*, 8 Mo. App. 341; *State ex rel. v. Walsh*, 69 Mo. 408; *State ex rel. v. Laughlin*, 75 Mo. 147; *Cunningham v. St. Louis*, 96 Mo. 53; *Babcock v. Hahn*, 175 Mo. 136.

Counsel for respondents, after a most exhaustive review of the authorities, have carefully prepared a brief upon this branch of the case wherein they have ably considered the constitutional provisions authorizing the separation of the city from the county of St. Louis, the scheme and charter, under which the separation was effectuated, the acts of the Legislature enacted in furtherance thereto, as well as a review of the decisions of this court and those of the St. Louis court of Appeals construing them, delivered near the time of their enactments, illuminated by the light of the political history of the times, in which that momentous event occurred.

Because of the thorough consideration of the question before mentioned and because of its important bearing upon the case at bar, as well as upon the status of, and the relation that exists between the city of St. Louis and the county of St. Louis, I feel justified in copying extracts therefrom (which are so much bet-

ter and more clearly expressed than I could hope to do) and adopt them as my views of the subject under consideration, which are as follows:

“1. Section 1 of article 6 of the Constitution of 1875 vests all judicial power of the State in the various courts named, among which are probate courts.

“Section 34 of this article requires the General Assembly to establish in every county a probate court, which shall be a court of record and consist of one judge, who shall be elected, and vests jurisdiction in probate matters in such probate courts. The section then ends with this proviso: ‘Provided, that until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law.’

“Section 35 of the same article provides that probate courts shall be uniform in their organization, jurisdiction, duties and practice, except that a separate clerk may be provided for or the judge may be required to act *ex-officio* as his own clerk.

“Section 5 of article 14 of the Constitution is as follows: ‘In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms and until their successors shall be duly elected or appointed and qualified.’

“Section 3 of the schedule provides as follows: ‘All county and probate courts, as now constituted and organized, shall continue with their jurisdiction, until the General Assembly shall by law conform them in their organization to the requirements of this Constitution.’

“Section 6 of the schedule is as follows: ‘All persons not filling any office or appointment in this State shall continue in the exercise of the duties thereof, according to their respective commissions or appointments, unless otherwise provided by law.’

“The Constitution of 1875 provided further for the enlargement of the boundaries of the city of St. Louis which was then a part of the county of St. Louis, and for a division of the county by the boundary line of the extended or enlarged city, thus making two political subdivisions of the old county of St. Louis, the one of which should be called the ‘County of St. Louis,’ and the other the ‘City of St. Louis,’ neither having any political relation to the other except that each was to be a copolitical subdivision or county of the State.

“These provisions are found in article 9, sections 20 and 25, inclusive.

“The method pointed out by section 20 for the accomplishment of this purpose was for the election on the call of the city council and county court of thirteen freeholders to draft a scheme for a division fixing the boundaries thereof, separating the enlarged city and county from each other. This scheme was also to provide for the reorganization of the government of the county and the adjustment of the relations between the enlarged city and the residue of St. Louis county, and the government of the city thus enlarged by a charter in harmony and subject to the Constitution and laws of Missouri, and provided that if the said scheme and charter were ratified by a vote of the people of the county they should become the organic law of the county and city, and such charter should become the organic law of the city at the end of sixty days after such election and should supersede the charter of St. Louis and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme.

“Section 21 provided for the authentication of the scheme and charter and that all courts should take judicial notice thereof.

“Section 22 provided for amendments of the charter.

“Section 23 provided, among other things, that the city should take upon itself the entire park tax and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, it should assume the whole of the existing county debt, and that the city and county of St. Louis shall be independent of each other and that the city shall be exempt from all county taxes; that the judges of the county court shall be elected by the qualified voters outside the city; that the enlarged city shall be entitled to the same representation in the General Assembly, collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined, and that the residue of the county shall remain a legal county of the State of Missouri, under the name ‘County of St. Louis;’ and the number of senators and representatives in the General Assembly of the enlarged city is fixed and also the number of senators and representatives for the new county.

“Section 24 is as follows: ‘The county and city of St. Louis, as now existing, shall continue to constitute the Eighth Judicial Circuit, and the jurisdiction of all courts of record, except the county court, shall continue until otherwise provided by law:

“2. The scheme for the separation of the county and city of St. Louis became, according to the constitutional provision, the instrument by which the two were separated and by which the reorganization of the county government was effected and became the organic law of the county and city. It went into effect October 22, 1876, having been adopted by vote of the people of the city and county as provided by the Constitution.

“Section 1 of the scheme defines the boundaries of the city and then provides as follows: ‘And the

residue of what now constitutes the county of St. Louis shall hereafter be called St. Louis county.'

"By section 2 all the authority of the county officers, as they existed theretofore, was forever abrogated and annulled, except for the purposes and in the cases hereinafter provided.

"Section 3 provided for the election at the general November election of 1876 of the various county officers for the new county, and further provides as follows: 'Immediately succeeding the election in November, 1876, and when the result thereof is officially determined, as hereinafter provided, the justices of the county court shall meet at James C. Sutton's house on the Manchester road for the purpose of organizing the new government of the county. . . . Said court may determine at what place in said county said court shall meet and the county offices be located until the question of a permanent seat of justice may be determined. 'The section further appoints three commissioners to select a suitable place for a 'permanent seat of justice of said county' and to submit their selection to a vote of the people.

"Section 4 provides for the then present county court of St. Louis county transacting the business of the new county until the election of the officers at the November election.

"Section 5 provides for the calling of an election by the Mayor, to be held at the time the general election in November, 1876, is held, for the election of a sheriff and coroner and public administrator of the city of St. Louis.

"Section 7 provides that the clerk of the county court to be elected, as provided in section 3 of the scheme for the new county, shall be ex-officio recorder of deeds for said county and that the then present recorder of deeds for St. Louis county shall thereafter be known as the recorder of deeds and shall hold his office for his term as then prescribed by law, and

that at the November election, 1878, and every four years thereafter, the city recorder should be elected by the city.

“Section 8 declares that the office of president of the board of assessors shall be a city office and under the control of the city government, and that such books and plats of said office shall be divided and the president of the board shall deliver to the proper officer of the county such portions as exclusively refer to St. Louis county, and if this cannot be done, abstracts shall be made thereof. It provides that the county collector shall continue in office and shall pay to the city treasurer taxes collected within the city limits and to the county treasurer taxes collected in the county until the end of his term of office.

“The office of county auditor was abolished altogether. The assessment of property for taxes for the year 1877 was required to be made by the president of the board of assessors of the present county of St. Louis—which office was declared by this section thereafter to be a city office. It also provides that as soon as the assessor of St. Louis county shall be duly elected and qualified the president of the board of assessors shall deliver to said assessor the books, plats and all papers pertaining to the office of said county, and that it shall thereafter be the duty of the assessor of said county to assess the property of said county.

“Section 9 requires the county court of St. Louis county to see that all buildings, moneys and other property belonging to the county, which are placed under the control of the city under this scheme, shall be formally and properly transferred, and that said court shall cause all records, books, papers, etc., now in the office of said court, to be turned over to the city register. It further provides that all employees and officers, now in the service of the county, in connection with public institutions or otherwise, and under appointment of said county court and within the limits

of the city of St. Louis, as herein established, shall continue in the discharge of their duties until notified to the contrary by the mayor.

“Section 10 provides that all public buildings, institutions, parks and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the courthouse, the county jail, etc., shall be transferred and made over to the city of St. Louis, and that in consideration of the city being the proprietor it shall assume the whole of the existing county debt and park debt. Section 11 requires the Municipal Assembly of the city to provide for payment of the said debt.

“The following sections of the scheme, down to and including the last, provide for the adjustment of the affairs of the city and county in keeping with the provisions heretofore referred to.

“3. The next act of the Legislature which need be noticed is the Act of April 9, 1877, Laws 1877, p. 229.

“For the first time the Legislature by this act provided a probate court for every county in the State, theretofore probate business having been transacted in some of the counties by the county courts, though there were probate courts established in some of the counties prior to this.

“Section 1 of this act provides that a probate court, which shall be a court of record and consist of one judge, is hereby established in the city of St. Louis and in every county of this State.

“Section 2 grants jurisdiction to the probate courts in probate matters.

“Section 3 provides that at the general election in the year 1878, and every four years thereafter (except as hereinafter provided) a judge of probate shall be elected by the qualified voters of every county.

“Section 7 provides that said court shall hold four terms annually commencing on the second Monday of February, May, August and November, and may hold special and adjourned terms at any time; and it also provides that said courts may alter the time for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient.

“Section 12 provides that the judge of probate shall hold his office at the county seat of his county and in the city of St. Louis.

“Section 18 provides, among other things, as follows: ‘All probate and ex-officio probate judges now in office shall continue in office and discharge all the duties of judges of probate under this act until the expiration of the terms for which they were respectively elected.’

“This section contains a proviso ‘that in all counties where the county courts or any member thereof has, by the present existing law, probate jurisdiction, there shall be a judge of probate elected for such counties at the general election in the year 1878, and every four years thereafter.’

“Section 19 provides that “all cases pending in probate courts at the time this act takes effect, the jurisdiction of which is not conferred by this act, shall be certified to courts of competent jurisdiction.’

“Until the Act of April 9, 1877, the several county courts in counties where there was no probate court had exclusive original jurisdiction in all probate matters. [1 Wagner’s Stats. (1870). p. 440, sec. 7.]

“In 1879 the Legislature of the State enacted a Statute of Definitions, the nineteenth paragraph of which reads as follows:

“ ‘Nineteenth. Whenever the word “county” is used in any law, general in its character to the whole State, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent

with the evident intent of such law or of some law especially applicable to such city.' [1 R. S. 1879, sec. 3126, par. 19.]

"This section was carried into 2 R. S. 1889, sec. 6570, par. 19, and in 1 R. S. 1899, sec. 4160, par. 19, and in 2 R. S. 1909, sec. 8057, par. 19.

"This section has been twice amended since 1879, but paragraph 19th has always been the same since its first enactment. [Laws 1883, p. 111; Laws 1885, p. 190.]

"The effect of the scheme was to divide the old county of St. Louis into two counties, one under the name of the city of St. Louis containing the old county seat and all the courts, offices and public buildings and was the old county less the portion cut off and named the county of St. Louis, which was under the necessity of creating a county seat for itself where would be located the county offices to which it became entitled by reason of becoming a county.

"That this was the effect of the separation of the city and county is attested by numerous decisions, many of them rendered about the time of the separation, some of which are here cited: State ex rel. v. Sutton, 3 Mo. App. 388; State ex rel. v. Finn, 4 Mo. App. 347; State ex rel. v. Mason, 4 Mo. App. 377; State ex rel. v. Finn, 8 Mo. App. 341; State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Laughlin, 75 Mo. 147; Ex parte Buckner, 9 Mo. App. 540; Cunningham v. St. Louis, 96 Mo. 53.

"The seat of justice of the county of St. Louis, prior to 1876, was the city of St. Louis. The courthouse of the county of St. Louis was located in the city of St. Louis by the act of December 14, 1822, and two years afterwards was built.

"The seat of justice of a county and the county seat mean the same thing. The county seat is the town

in which the county and other courts are held and where county officers perform their function.

“The city of St. Louis has been, since the separation from the county in 1876, for all necessary purposes, a county in itself. [Babcock v. Hahn, 175 Mo. 136.]

“The Supreme Court, in Banc, by unanimous opinion, used the following language respecting the status or character of the city of St. Louis in the case of State ex rel. v. Bus, 135 Mo. 325, l. c. 337:

“ ‘While the city of St. Louis is strictly a municipal corporation, its territory is also a subdivison of the State in which officers are elected to perform the functions of the State government as distinguished from those pertaining to municipal government. These officers are in no sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction rather than to the governmental duties they perform. They are officers under the laws of the State and perform their duties within the city limits. The sheriff of the city of St. Louis is an officer of the city in the same sense that a sheriff of a county is an officer of the county. He is no more a municipal officer than a sheriff of a county is an officer of a municipal corporation, the territory of which is included in his jurisdiction. These propositions are settled by the decisions of this court. [State ex rel. v. Dillon, 87 Mo. 490, 491; State ex rel. v. McKee, 69 Mo. 504; State ex rel. v. Rombauer, 101 Mo. 502, and also State ex rel. v. Mason, 4 Mo. App. 380; State ex rel. v. Finn, 8 Mo. App. 341.]’

“The Supreme Court, in Banc, further said, in the case of State ex rel. v. Railroad, 195 Mo. 228, l. c. 241: “ ‘The city of St. Louis is a political subdivision of the State as much as any county in the State, and is treated as a county.’

“The division of the old county of St. Louis took effect October 22, 1876, and thereafter each part, for

court and other State purposes, formed a separate county.

"The Act of April 9, 1877, providing for probate courts in the city of St. Louis and in every county in the State, was enacted in pursuance of sections 34 and 35 of article 6 of the Constitution, and of necessity treated the city of St. Louis as one of the counties of the State, and it is a county in so far as the probate court is concerned and the office of probate judge in the city of St. Louis is a county office. [Henderson v. Koenig, 168 Mo. 356, 362, 363, 368, 374.]

"After the separation of the city and county of St. Louis the probate court of the old county of St. Louis remained the same court that it had been since 1841 with its name changed to the probate court of the city of St. Louis, and with its territorial jurisdiction curtailed as soon as a new probate court for the new county of St. Louis was created by the Act of 1877.

"4. The effect of the scheme was that the old probate court of the old county of St. Louis continued to exist as the probate court of the city of St. Louis upon the city's separation from the county, and a new probate court was created for the new county of St. Louis.

"The seat of government of the old county of St. Louis was in the city of St. Louis, where was located the courthouse and all the county offices, and they remained there after the separation of the city and county except those offices which were abolished.

"The legal effect of the separation of the city and county was a division of the old county of St. Louis into two counties, the one, namely, the city of St. Louis, having within its borders the seat of government; while it may not have continued to be the identical entity as the old county, and while the form of its government thereafter was different from what it was before, it was at least the continuation of and successor to, for legal purposes, the old county, and

its government the successor, in so far as the same functions were provided to be performed, of the old government; the courts, except the county court, which was expressly abolished, remained the same and retained the same habitation and jurisdiction.

"This is true both as matter of political history of the times, attested by the knowledge of all who are familiar with these times, and also as a matter of law, as is clearly shown by reference to the Constitution of the State, the acts of the Legislature, the scheme of separation of the city and county of St. Louis, and the decisions of the courts, and the evidence in this case showing that the records of the probate court, which existed prior to the Act of 1877, are in the courthouse in the city of St. Louis.

"Section 34 of article 6 of the Constitution provides that, 'the General Assembly shall establish in every county a probate court,' etc., and further provides 'that until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law.'

"The term 'jurisdiction' as here used involves both territorial as well as juridical scope and jurisdiction. [State ex rel. v. Laughlin, 75 Mo. l. c. 155.]

"The probate court of St. Louis county continued, therefore, to exercise the same territorial jurisdiction until the passing of the Uniform Probate Court Act of 1877 (Laws 1877, p. 229). It also exercised the same judicial functions within this identical territory. Its name even was unchanged by any legislative or actual designation.

"Up to the time of the taking effect, therefore, of the Act of 1877, by every conceivable test, the original probate court of the county of St. Louis retained its original constitution. Furthermore, it is a well-known fact of local history that it preserved even its local

habitation in the city of St. Louis and the personality of judge and other officers.

"It ought to be reasonably plain, therefore, that the adoption of the scheme and charter did not, and could not, of itself put an end to the court's existence.

"But this it not all. By section 24 of article 9 of the Constitution it is expressly provided that 'the jurisdiction of all courts of record, except the county courts, shall continue until otherwise provided by law.'

"The probate court of St. Louis county was a court of record, having a territorial jurisdiction that embraced both city and county. It therefore continued to exist as the same court in spite of the separation of city and county.

"Not content with these plain indications of their intention, the framers of the Constitution superadded, in the schedule of the Constitution, a plain and unequivocal statement of their intention, reading as follows: 'Section 3. All county and probate courts, as now constituted and organized, shall continue with their jurisdiction, until the General Assembly shall by law conform them in their organization to the requirements of this Constitution.'

"This was a probate court. Under this plain language, its constitution, organization and jurisdiction remained at the very least until the taking effect of the act of the Assembly, which was not to create but to conform existing probate courts to the requirements of uniformity prescribed by the Constitution. Its seat remained in the city of St. Louis; its jurisdiction remained.

"5. The eighteenth section of the Act of April 9, 1877, continued in office judges of probate who were then holding office, until the expiration of the term for which they had been elected, and consequently continued the office, for an officer cannot be continued in an office that does not exist, and the office being that

of judge of the probate court, the court was continued or remained in existence as it was at the time of the passage of that act.

“It was so expressly held with respect to the probate court of Lafayette county, in the case of *State ex rel. v. Gammon*, 73 Mo. 421, decided at the April term, 1881, where the Supreme Court also held that giving that effect to the Act of 1877 did not bring it in conflict with section 34 of article 6 and section 35 of article 6 of the Constitution.

“What, then, was the effect of the Statute of 1877?

“Before considering its terms, it may be stated that J. G. Woerner was elected judge of the probate court of the county of St. Louis at the general election held in the year 1876. [See sec. 4 of the Act of 1885.] He continued to hold his seat and perform the functions of a judge of that court past the sale here in controversy without any new election or fresh appointment. Thousands of matters were presented to and acted upon by the court, and by the judge thereof, during its terms. To disturb these matters would be to disquiet the titles of an incalculable amount of property in this city and in this State.

“It is further a well-known historical fact that the first judge of the probate court in the segregated portion of the county was James A. Henderson, who was appointed and commissioned as such by Governor Phelps under the Act of April 9, 1877, on the 2d day of August, 1877. The first place of meeting of this court was at Mt. Olive, the temporary seat of justice in that subdivision of the county before any permanent county seat had been selected. No appointment of judge for the city of St. Louis was made under that act for the reason that that office already had an incumbent in the person of Judge WOERNER.

“It is further a well-known and historical fact that no cases were transferred from the old court in

the city of St. Louis to the new one in the county.

“The records of the old court remained and were kept in the courthouse in the city of St. Louis, in the charge and under the control of the same judge and officers who had theretofore been vested with their custody. The seat of the old court had been fixed by the Law of 1841, as being the courthouse of the county of St. Louis in the city of St. Louis, where the probate court still holds its sessions. After the taking effect of the statute of 1877 the court that had existed remained in its old quarters. It retained there its records, its unfinished causes, its judge and its clerk. There was no interruption in the orderly course of its business.

“There existed no probate court for the segregated portion of the county until August, 1877. Then a new judge was appointed for it, a seal adopted, temporary quarters secured, and rules were framed for its government. It succeeded to no unfinished business, but took up such causes as subsequent death or other casualty within the territorial limits of its jurisdiction brought before it.

“All of these facts constitute familiar local and political history, and as such are within the fair limits of the judicial cognizance of this court.

“Under this state of facts, it is manifest that practical and contemporaneous construction regarded the court, existing in the city of St. Louis after the taking effect of the Statute of 1877, as a mere continuation of the old court.

“The weight to be given to contemporaneous construction in matters of this kind, after many years of acquiescence, is so strong that no court will disturb the composed slumber of things that were done in reliance thereon unless the legal necessity therefor be plain and apparent.

“No such legal necessity is apparent here; the converse is true.

“Section 18 of the Act of 1877 provides as follows:

“‘Sec. 18. All probate and ex-officio probate judges, now in office, shall continue in office and discharge all the duties of judges of probate under this act until the expiration of the terms for which they were respectively elected, and shall receive in full satisfaction for their services, until the expiration of the time for which they were elected, the compensation now provided by law, anything in this act to the contrary notwithstanding, except such ex-officio probate judges as have jurisdiction over a part only of the county, in which case they shall receive the same compensation that they receive while sitting as judges of the county court, and no more; *provided*, that in all counties where the county courts, or any member thereof, had by the present existing law probate jurisdiction, there shall be a judge of probate elected for such counties at the general election in the year 1878 and every four years thereafter.’

“Fresh duties could of course be imposed upon an existing and continuing officer. But if a court were wiped out and abolished there could no longer be any such officer as a judge of that court. If, on the other hand, the statute be regarded as conforming to a general plan, an existing court, its identity as a political organism with that of its officers, remains; and upon them as existing and continuing courts and officers, duties could be validly superadded or taken away.

“It is an established canon of construction, familiar to this court, that such an interpretation must be given to a law, if possible, as will render it valid rather than invalid, that it may live rather than perish. For this reason, the interpretation favoring continuance of existing courts should be adopted.

“In the next place, back of every statute stands the Constitution, and the statute must be interpreted in substantial harmony with the expressed will of the

Constitution. For the purpose perhaps of rousing as little opposition as possible to the changes of the new Constitution or with a view perhaps of avoiding too sudden changes, that instrument is remarkably full in its express intent to interfere as little as possible with the terms of judicial officers in existing courts.

"Now there is absolutely nothing in the statute of 1877 that is contrary to the continued existence as a court of the old probate court of the county of St. Louis, located in the city of St. Louis, and its location was not changed. The general framework of the law of 1877 is little different from that of the law of 1855, creating the old probate court of the old county of St. Louis. Most of the changes may be accounted for by a reference to the 19th section of the Law of 1877: 'All cases pending in probate courts at the time this act takes effect, the jurisdiction of which is not conferred by this act, shall be certified to courts of competent jurisdiction.' The plain implication is that the other cases were to be retained.

"The Act of 1877 does not undertake to repeal the law of 1855 creating the probate court of the county of St. Louis, but simply provides merely that all acts and parts of acts inconsistent with the Act of 1877 should stand repealed."

In the light of these observations it must follow, that it was not the design of the Act of 1877, or of any subsequent act, to abolish any probate court then existing in any of the counties of the State, but in express terms it continued their existence, and in obedience to the express mandate of section 34 of article 6 of the Constitution, created new probate courts in all of the counties of the State, which at that time had none, probably ninety-five in number, St. Louis county being one of the number.

We, therefore, also rule the second contention against the appellants.

II. The final insistence of counsel for appellants is stated in the following language, viz.:

“The first sale of the lands in controversy by the administrator having been disapproved by the probate court, the order to sell could have been renewed by the probate court at the same term at which the same was disapproved while the heirs were presumed by law to be present in court, but as this was not done, and as the heirs of Bogy did not appear in court and did not ratify the proceedings in any manner, the renewed order of sale, upon which respondents’ claim is based, made nearly a year after the sale was disapproved, was void for want of jurisdiction.

This insistence is predicated upon section 168, Revised Statutes 1879, which reads as follows: “If such report and proceeding of the executor or administrator be not approved by the court, his proceedings shall be void, and the court may order a new sale, upon which the same proceedings shall be had as upon the original order.”

If we correctly understand the position of counsel, it is this: That when the order of the court disapproving the first sale was made, and the term elapsed without ordering a new sale, the court lost jurisdiction over the heirs of Lewis V. Bogy, and was therefore powerless to make the second or subsequent order of sale without again notifying them of the renewed application for an order to make the second sale.

In support of this position counsel cite: *George v. Middough*, 62 Mo. l. c. 551; *State ex rel. v. Walbridge*, 119 Mo. l. c. 394; *Koch v. Hawkins*, 40 Mo. App. 680; *Ault v. Bradley*, 191 Mo. l. c. 729.

We have carefully considered all of those cases and are satisfied that the rule there announced is not applicable to the facts of this case.

In those cases a final judgment had been rendered, from which an appeal would have lain, and at a subsequent term, without notice to the parties, the court

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attempted to change or modify the judgment. This court and the Court of Appeals very properly held that such alteration was void for want of jurisdiction over the opposite parties. But that is not this case. Here the heirs of Bogy were duly brought into court to show cause, if any, they had, why the land should not be sold to pay the indebtedness of the estate. They made no such showing, and consequently the court in pursuance to its finding, that the estate was hopelessly insolvent, ordered the land sold to pay debts; but owing to the inadequacy of the price, the court set the sale aside. That left the proceedings for an order of sale still pending, the same as a cause in the circuit court, where after judgment a motion for a new trial has been sustained or the court, of its own motion, during the term, has set the judgment aside. In both instances all the parties to the cause remain in court until a final disposition of the case is made one way or the other.

It is elementary that whenever a party is duly summoned into court for a particular purpose he remains there until that purpose is finally accomplished or disposed of, or until he is otherwise discharged according to law.

That precise question was decided by this court in the case of *State ex rel. v. Wilson*, 216 Mo. 215, l. c. 282; and it only announced the doctrine which had been frequently announced by this court in previous cases, and which has been followed by us in a number of cases since then.

Coming nearer to the precise question here presented, are the following cases: *Rhodes v. Bell*, 230 Mo. 138; *Rogers v. Johnson*, 125 Mo. l. c. 214; *Sims v. Gray*, 66 Mo. l. c. 616; *Stowe v. Banks*, 123 Mo. 672; *Greffet v. Willman*, 114 Mo. 106; *Collier v. Lead Co.*, 208 Mo. 246.

In the *Rhodes-Bell* case, *supra*, at page 159 the court used this language: "It is next insisted that

the renewal order of sale made on March 27, 1877, under which the lands in suit were sold, is void, because the probate court changed the terms of sale from a private to a public sale, without notice to the heirs of Liggitt. Administrators' sales under orders of the probate court are judicial sales, and in *Tutt v. Zenir*, 51 Mo. 431, this court held that it was perfectly competent for the county court to modify an order of sale made by itself so as to authorize property which had been ordered to be sold at public sale to be sold at a private sale, and that decision has never been questioned or criticised in any subsequent case in this court. Judicial sales in contemplation of law are made by the court itself through its receiver or administrator and we can discover no reason why the court may not in proper case modify or change its order. [*Noland v. Barrett*, 122 Mo. l. c. 189.]”

In *Sims v. Gray*, *supra*, the court on page 616 said: “It may be proper to remark that if the defendant had introduced the administrator’s deed, the judgment might be upheld, notwithstanding the fact that the sale was reported and approved at the same term at which it was made. When the petition for the sale of the real estate was filed and publication was made, notifying all persons interested in the estate that, on a day named, an order for the sale thereof would be made, unless cause to the contrary should be shown, the heirs were in court; and no other or further notice was required, by law, to be given to them of any subsequent proceedings in the cause. The court was a court of record, having complete jurisdiction of the subject-matter of the proceeding, and while such jurisdiction must be exercised according to law, yet if the court exceeds its powers under the law, and disregards the statutory requirements established for its guidance, its acts may be irregular or erroneous, but they will not be void. [*Johnson v. Beazley*, 65 Mo. 250.] A judgment rendered after notice, but sooner

than it should have been rendered according to the rules of law, or the practice of the court, is simply an irregular judgment, and may be set aside on motion, in any court of record, at a subsequent term. [2 Wag. Stat. (1870), 1062, section 26; *Branstetter v. Rives*, 34 Mo. 318; *Lawther v. Agee*, 34 Mo. 372; *Harkness v. Austin*, 36 Mo. 47.] This remedy seems to have been overlooked in the cases of the State to the use of *Perry v. Towl*, 48 Mo. 148, and *Castleman v. Relfe*, 50 Mo. 583, where it was clearly applicable, and also in the cases of *Strouse v. Drennan*, 41 Mo. 289, and *Mitchell v. Bliss*, 47 Mo. 353. The judgment of the circuit court will be reversed and the cause remanded."

In *Stowe v. Banks*, *supra*, the court held that where, after an order to show cause why the real estate should not be sold to pay debts, it was sold by the administrators and afterwards repurchased by them for the use of the estate, a second order to show cause was not necessary.

And in *Greffet v. Willman*, *supra*, the court on page 119 said: "That Louis E. Roy died seized in fee simple of three-fourths of the land in question, there is no doubt. The only doubt as to plaintiff's wife having acquired his title thereto is in the suggestion aforesaid of defendant's attorneys, that the administrator, under the order of the probate court, had no power to make a resale upon the failure of Strong to comply with the term of the sale. This doubt seems to have arisen from the want of a proper appreciation of the force of the whole record of the probate court in the matter. There never was in fact a consummated sale of the property to Strong which could be confirmed, and no such sale thereof was reported to the court. What the administrator reported to the court was that he had offered the property for sale in pursuance of the order of sale, that Strong was the highest bidder at the sum of \$21.75 and the prop-

erty had been knocked off to him, and that he was willing to comply with the terms of sale, provided it would meet with the approval of the court. Thereupon the order of the tenth of August, 1874, was made, which is relied upon to give color to this objection to the title. The terms of the order do not appear in the record; but whatever the form of the order may have been when the administrator made his report, no sale to Strong had been made. He reported that none had been consummated, and what he had done in that direction, and the willingness of Strong to complete the sale upon the approval of the court. The most the court could do in its then condition was to signify its approval of the proceedings of the administrator so far as he had gone and give assurance of a confirmation of the sale when the terms thereof should be complied with. The jurisdiction of the probate court to execute its own judgment for the sale of the property could not be lost until a sale had actually been consummated under its order, and, after this order was made, Strong, having failed and refused to comply with the terms thereof, in other words, refused to take the property at his bid and either pay or secure the purchase money, there can be no doubt of the power of the court to enforce its judgment for the sale of the property for the payment of the debts of the deceased by ordering a sale at any subsequent term until a sale was effected; or that the purchaser at such sale would acquire the title of the intestate. [2 Woerner's American Law of Administration, p. 1064.]”

I can add nothing new to what this court has clearly said upon this question, and if we apply the rule announced in the foregoing cases, to the case at bar, it will result in holding that the order of sale and the sale of the land in controversy, by the administrator, Holliday, made at the next or succeeding term of the court, was invalid, and that the administrator's

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deed made in pursuance thereof was effectual to convey a good title thereof to the purchasers.

And upon the other hand, we must hold that the quitclaim deeds from Joseph Bogy and Josephine Noonan, heirs of Lewis V. Bogy, dated September 18, 1895, conveying the lands in controversy to J. W. Chilton, and the quitclaim deed from said Chilton to John C. Brown, his co-appellant, conveying one undivided half interest in the same land to the latter, are absolutely null and void, and are of no force or effect, except to cast a cloud upon the title of the respondents.

We are, therefore, of the opinion that the judgment should be affirmed, and it is so ordered. All concur.

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ABSTRACTS.

1. **Appeal: No Abstract: Ignorance of Rules.** Filing a full transcript does not satisfy Rules 12 and 13. There must also be an abstract; and the ignorance of the rules is not a sufficient excuse to prevent a dismissal of the appeal. *Crothers v. La Force*, 365.
2. **Motion Called for in Bill: Printed in Record Proper.** A motion for a new trial, which the bill of exceptions says was made a part thereof and which further says that the motion is not reprinted as a part of the bill since it is printed under abstract of record proper, if in fact it is so printed, will be considered on appeal. But such method of printing the motion is not approved. Its proper place is in the bill of exceptions. *Mugan v. Wheeler*, 376.
3. **Appeal: Affidavit. Recitals in the abstract of the record** that in due time an affidavit for an appeal was filed, praying an appeal to the Supreme Court, which appeal was granted and allowed, are sufficient to entitle appellant to a hearing of his appeal in the Supreme Court, although neither the affidavit itself nor more of its substance is set out in the abstract. *Campbell v. Boyers*, 421.

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Malicious Prosecution: Reasonable Doubt. In no case can an action for malicious prosecution be sustained where there was probable cause. *Held*, that in this case there was probable cause. *Hanna v. Insurance Co.*, 383.

ADMINISTRATION.

1. **Probate Court: Term: Alteration of Time.** Under the Laws of 1877, page 230, section 7, and the Revised Statutes of 1855, page 1601, section 9, the probate court of St. Louis

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county, at the June term, 1877, and on July 28th of that year, had express authority to make and enter of record an order changing the time for holding its stated terms, and to fix upon the second Monday in September and the first Mondays of December, March and June as the times for the beginning of the regular terms of the court. *Brown v. Marshall*, 707.

2. ———: ———: ———: ———: **Before Act of 1877 Went Into Effect.** Even if the order changing the times for the beginning of the terms of the probate court of St. Louis county, made on July 28, 1877, was made one day prior to the time the Act of 1877 went into effect, the Act of 1855 (R. S. 1855, p. 1601, sec. 9) was then in force, in almost the same words, and was ample authority for the order, since the Act of 1877 did not purport to repeal any of the Act of 1855 except "all acts and parts of acts inconsistent with this act," and there is nothing inconsistent between the two, and besides the Act of 1877 was but a continuation of the Act of 1855. *Ib.*
3. ———: ———: ———: ———: **Statutory Construction: Continuation of Existing Act.** A subsequent act repealing and reenacting at the same time a preexisting act is but a continuation of the latter, and the law dates from the passage of the first act and not from the date of the latter. *Ib.*
4. ———: ———: ———: ———: **By Probate Court of County of Terms of City Court: Separation.** The separation of the city of St. Louis from the county of St. Louis in 1876 did not affect the origination, jurisdiction or location of the probate court of St. Louis county then existing. The probate court of St. Louis county had authority at its July term, 1877, to change the time for beginning the regular terms of the probate court of St. Louis city. That was not an attempt by one court to make an order changing the terms of another court. Prior to the division of the county into the city and county of St. Louis, the county seat, courts, offices and public buildings of the county of St. Louis were in the city of St. Louis, and those courts continued and remained in the city after the segregation of the present county; and the change from the probate court of the county of St. Louis to the probate court of the city of St. Louis was a change only in name, with the single exception that, after the Act of April, 1877, creating a probate court for the segregated county of St. Louis, the territorial jurisdiction of the city court was *pro tanto* curtailed. In all other respects it continued with the same officers, the same habitat and the same jurisdiction. *Ib.*
5. **Administrator's Sale: Of Real Estate to Pay Debts: Disapproved: Renewal of Order at Subsequent Term.** Where a valid order to sell the real estate to pay decedent's debts has, after proper statutory notice to the heirs and parties interested has been given, been made, and the sale made in pursuance thereof has been disapproved because of the inadequacy of the price obtained, it is not necessary to the validity of a renewal order to sell that such renewal order be made at the same term, or that the heirs and interested parties be given further notice before the renewal order is made at a subsequent term. Whenever a party is duly summoned into court for a particular purpose he remains there until that purpose is finally accomplished or disposed of, or until he is otherwise discharged according to law. *Ib.*

APPEALS.

1. **Receivers: Distribution of Proceeds: No Objection to Order Until After Appeal.** Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiff may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands; and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree. *Trendley v. Railroad*, 73.
2. **Nonsuit as to Some Counts: Verdict as to Others: One Final Judgment.** Where plaintiff suffered nonsuit as to two counts in his petition, and the trial proceeded to a verdict on the others, and one judgment was entered, reciting the nonsuit on some of the counts and a judgment for defendant thereon, and a verdict on the others and a judgment for plaintiff on them, and thereafter plaintiff filed his motion to set aside the judgment of nonsuit, and it being overruled he appealed, there was but one final judgment, and that embraced the whole case, and plaintiff can maintain his appeal, and the court will pass only on the correctness of the involuntary nonsuit. *Scott v. Realty Co.*, 112.
3. ———: ———: ———: **Effect of Reversal.** But if the judgment is reversed, the reversal will be as to the whole judgment, but the verdicts as to the two counts on which plaintiff had judgment will not thereby be set aside, but they will be reserved, and incorporated in the final judgment to be rendered after a trial on the other counts as to which he suffered a non-suit. *Ib.*
4. **Appellate Practice: Weight of Testimony: Matter for Jury.** The Supreme Court has nothing to do with the weight of testimony in a law case. Its function is to say whether there was any substantial testimony. It will not uphold a verdict supported by only a mere glimmer or spark, a mere *scintilla*, of testimony; but if there is substantial testimony, however small as compared with the great body of proof, the appellate court has no right to meddle with the weight of it, or ignore it because negative in character. *Dutcher v. Railroad*, 137.
5. ———: ———: ———: **Negative Testimony: New Trial.** Nor can the Supreme Court reverse a verdict for plaintiff though it rest alone upon testimony negative in character, if that testimony is substantial. Where the nineteen-year-old plaintiff was bareheaded and had good ears, yet neither she nor the ten-year-old child with her heard any alarm signal from the train approaching from behind, the appellate court will not say that the signals were sounded though several other witnesses, both interested and disinterested, positively testify they were sounded. The trial court, under such circumstances, might properly grant a new trial to defendant on the ground that the verdict was against the great weight of the credible testimony; but that negative testimony was substantial, and

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in the face of it the appellate court has no right to reverse a verdict for plaintiff, even if the failure to sound the alarm signals were the only issue of negligence in the case. *Dutcher v. Railroad*, 137.

6. **Agreed Statement: Matter of Exception.** Agreed statements of facts, in cases instituted by petitions, are mere matters of evidence, and do not become a part of the record unless incorporated in a bill of exceptions. *Fruin v. O'Malley*, 250.
7. **Exceptions: Separate Finding of Facts.** Under the statute (Sec 1972, R. S. 1909) both the special findings of facts and conclusions of law should be entirely separate from the judgment, in order that the party excepting to such finding may except to the "decision of the court on the conclusions of law or equity arising in the case," which means that such exceptions to the court's conclusions of law shall be saved as may be properly included in a bill of exceptions. The law does not contemplate that exceptions shall be written into the record proper. *Ib.*
8. ———: **No Bill of Exceptions.** In an action at law, where there was a special finding of facts, which is not made a part of the judgment, and no bill of exceptions was filed, there is nothing for review on appeal but the record proper, and a separate finding of facts is not a part of the record proper; and if the judgment is legally sufficient within itself, and the petition legally sufficient to support the judgment, that judgment will be affirmed. But if there is an error on the face of the judgment, that error will be corrected. *Ib.*
9. **Correcting Judgment: Wrong Rate of Interest.** Where the judgment in a case to foreclose a lien for special taxbills issued in payment of a street improvement in St. Louis, on its face shows that it bears interest from the date of its rendition at eight per cent, that judgment will, though there is no bill of exceptions, be so corrected as to make it bear six per cent interest. *Ib.*
10. **Order Granting New Trial: Not Preserved: Appellate Practice.** Where the order granting to defendants a new trial is not set out in the record, the presumption will be indulged, on appeal, in favor of the court's action, and it will be upheld if sustainable upon any of the grounds of the motion for a new trial. *Peper v. Peper*, 260.
11. ———: **Appellate Practice: Sustained by Substantial Evidence.** Where under the facts and circumstances in evidence it cannot be said that there was no substantial evidence against the finding and decree of the court, the appellate court will not hold that the trial court erred in granting to defendants one new trial, where in their motion therefor they aver that the judgment is contrary to the evidence and that there is no evidence to support the judgment quieting the title in plaintiff. *Ib.*
12. ———: ———: **Judgment on Merits.** But where the appellate court has reached the conclusion that the trial court did not err in granting to defendants one new trial, it will not go further and review the case on the merits and direct the trial court to set aside the order granting a new trial

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and render judgment for defendants. There is no final judgment after the order granting a new trial was entered, and the appellate court's duty, on an appeal from that order, is to review only the court's action in granting the new trial. *Ib.*

13. **Instruction: Not Preserved in Bill.** The action of the court in refusing instructions on the subject of alibi, set out in the record proper but not made a part of the bill of exceptions, is not for review on appeal. *State v. Conway*, 271.
14. ———: **No Exception: No Request.** Although no exception was saved to an erroneous instruction given for the State, or to a failure to instruct on all the law of the case, and no other objection was made except that in the motion for a new trial it was assigned as error that the court "erred in failing to instruct on the whole law governing the case," the defendant is entitled to a reversal of the judgment of conviction of both larceny and burglary on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict," as the statute (Sec. 5231, k. S. 1909) specifically requires. The court should have given instructions providing for a separate verdict as to the distinct offenses, whether requested or not, and whether or not an exception was saved to its failure to do so, a failure to so instruct will work a reversal on appeal. *Ib.*
15. ———: ———: **Non-Direction.** Non-direction, with or without exceptions saved, is error in a felony case. There is an inherent difference in this regard between civil and criminal cases, some of which are enumerated in the opinion. Besides, the statute specifically requires instructions to the jury, "whether requested or not, upon all questions of law arising" in a criminal case "which are necessary for their information in giving their verdict;" and into that statute cannot be read the proviso that non-direction in a felony case is not error which will warrant a new trial unless it affirmatively appear that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to its failure to so instruct. *Ib.*
16. ———: ———: ———: **in Felony Cases: Statute.** The provision in said Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case. *Ib.*
17. ———: ———: ———: **Motion for New Trial: General Assignment: Usually Insufficient: Exception.** The motion for a new trial should call the court's attention to the specific point of law on which it is claimed the court failed to instruct, otherwise it will ordinarily be insufficient;

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but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of justice, will grant a new trial, though the point be presented in it for the first time. *State v. Conway*, 271.

18. **Suit to Quiet Title: Defense of Limitations: Action at Law: Statement.** An action under Sec. 2535, R. S. 1909, to quiet title, and for ejectment, to which is pleaded the defense of limitations, is an action at law, and the Supreme Court will not usurp the duty of the trial court, sitting as a jury, to weigh the evidence. The appellate court's statement of the case means simply that there was some evidence of the facts stated. *Slizer v. Owens*, 319.
19. ———: ———: **Granting New Trial: Appeal.** Where the trial court, after deciding the many things in issue upon evidence which left many of them uncertain, and after giving judgment, sets aside its findings and grants a new trial, the order granting a new trial must be affirmed. *Ib.*
20. **No Abstract: Ignorance of Rules.** Filing a full transcript does not satisfy Rules 12 and 13. There must also be an abstract; and the ignorance of the rules is not a sufficient excuse to prevent a dismissal of the appeal. *Crothers v. La Force*, 365.
21. **Assignment of Errors.** If the alleged errors of the trial court are set out intelligently and in numerical order in appellant's brief, with the authorities in support of each proposition, Rule 15 of the court, requiring appellant to "separately allege the errors committed by the inferior court," has been sufficiently complied with. *Mugan v. Wheeler*, 376.
22. **Abstract: Motion Called for in Bill: Printed in Record Proper.** A motion for a new trial, which the bill of exceptions says was made a part thereof and which further says that the motion is not reprinted as a part of the bill since it is printed under abstract of record proper, if in fact it is so printed, will be considered on appeal. But such method of printing the motion is not approved. Its proper place is in the bill of exceptions. *Ib.*
23. **One Exception: Two Motions.** Exceptions saved to one order overruling the motion for a new trial and the motion in arrest, preserve for review the action of the court upon both motions. *Ib.*
24. **Pleading: Departure: Abandoned Petition Not Preserved.** Whether or not the amended petition was a departure from the original petition cannot be considered on appeal, unless the original petition is made a part of the record as a matter of exception. *Ib.*
25. **Affidavit.** Recitals in the abstract of the record that in due time an affidavit for an appeal was filed, praying an appeal to the Supreme Court, which appeal was granted and allowed, are sufficient to entitle appellant to a hearing of his appeal in the Supreme Court, although neither the affidavit itself nor

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more of its substance is set out in the abstract. *Campbell v. Boyers*, 421.

26. **Departure: Amended Petition: Original Abandoned: Matter of Exception.** When an amended petition is filed by leave of court, the original petition is abandoned and thereafter can be made a part of the record only as a matter of exception, and if not made a part of the record by exception only the amended petition is before the court on appeal, and the question of whether the amended petition was a departure from the original cause of action is not for consideration. *Ib.*
27. **Amended Petition: Motion to Strike Out: Overruled: No Exception.** If plaintiff files an amended petition and thereupon defendant files a motion to strike it out, and that motion is overruled, to which no exception is saved, and thereafter defendant appears and testifies before the referee, his answer to the original petition, which remained on file and was not withdrawn, must be considered a pleading on file and responsive to the amended petition. *Ib.*
28. **Referee's Report: Exceptions: Equity.** Alleged errors growing out of a reference are matters of exception and can only be reviewed when incorporated in a bill of exceptions. Besides, in an equity case a referee's report, like the verdict of a jury, is only advisory, and not binding upon the court. *Ib.*
29. ———: **Not made a Ground for New Trial.** The disposition made of the referee's report is not for consideration on appeal unless the court's action in reference thereto is made a ground in the motion for a new trial. *Ib.*
30. ———: **Ruling Excepted to Set Aside.** An appellant cannot be heard in the appellate court to complain of a ruling of the trial court against him which was afterwards set aside. Where the decree and ruling of the trial court upon the referee's report, to which appellant objected and filed his term bill of exceptions, was at the same term of court set aside and for naught held, appellant cannot be heard to urge his objection to that report. *Ib.*
31. **Fraud and Decelt: Appellate Practice: Simple Reversal.** Where all the facts are before the court in an action of fraud and decelt, tried by the court sitting as a jury, there is no necessity for a new trial; and the judgment for defendant being wrong, it will simply be reversed, and the trial court directed to enter judgment for plaintiff. *College v. Dockery*, 522.
32. **Motions: Attorneys: Right to Practice.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom. *State ex rel. v. McElhinney*, 592.

ASSIGNMENT OF ERROR.

Appeal. If the alleged errors of the trial court are set out intelligently and in numerical order in appellant's brief, with the authorities in support of each proposition, Rule 15 of the court, requiring appellant to "separately allege the errors committed by the inferior court," has been sufficiently complied with. *Mugan v. Wheeler*, 376.

ATTORNEYS.

1. **Remarks of Counsel: Reasonable Verdict, etc.** The straying by plaintiff's counsel in the heat of argument a little out of the record, for which he was admonished by the court, in a case which is not a close one, in which the size of the verdict does not show inflamed minds in the jurors, will not justify a reversal or a new trial. *Dutcher v. Railroad*, 137.
2. **Right to Practice: Property Right.** The right of an attorney to practice law is a valuable property right, which cannot be taken from him by an arbitrary act of the court, but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense. *State ex rel. v. McElhinney*, 592.
3. ———: ———: **Arbitrary Order: Due Process of Law.** An arbitrary order of a court depriving a duly licensed attorney of his right to practice law is not due process of law, and under both the State and Federal Constitutions such order would be null and void. *Ib.*
4. ———: **Probate Judge: Motion to Practice.** But where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof. *Ib.*
5. **Motions: Appeals: Attorneys: Right to Practice.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom. *Ib.*

BILL OF EXCEPTIONS. See *Exceptions*.

BURGLARY AND LARCENY.

1. **Sufficient Evidence.** Where the evidence showed that both the burglary and larceny had been committed by some one, and a gold watch and two or three hundred dollars in money taken, and there is testimony that defendant was in possession of the watch shortly after the burglary was committed, the evidence is sufficient to take the case to the jury as to both the burglary and larceny. *State v. Conway*, 271.
2. **Cross-Examination of Witness: Former Penitentiary Record of Defendant: Collateral Matter: Alibi.** The defendant was charged with burglary and larceny of money and a watch, and interposed an alibi as a defense. The State had shown that a short time after the burglary defendant had gone to a saloon and exchanged ten dollars in silver for a ten-dollar bill. For the purpose of accounting for the fact that he had ten dollars in his possession, defendant called a witness who testified that defendant was usually employed and that he had been employed in another city for three or four years preceding the date of the offense. The prosecuting attorney, on cross-examination, asked the witness if he did not know that defendant was in the penitentiary during the time he had testified he was in said city. The defendant had not testified and had not introduced evidence of good character. *Held*, that it was error to permit the prosecuting attorney to cross-examine the witness as to defendant's former imprisonment. *Ib.*
3. ———: ———: ———: ———: **Cured by Direction to Disregard.** On cross-examination the witness testified that he had heard persons say that defendant was in the penitentiary during the time witness had on direct examination testified he was in another city, and after defendant's motion to strike out this answer was overruled the court, of its own motion, said: "That part which he heard will be stricken out and will not be considered by the jury." *Held*, that the error in permitting the prosecuting attorney, on cross-examination, to ask the witness if defendant was not in the penitentiary during the time he had testified he was in another city, was not cured by the action of the court in striking out what the witness heard and directing the jury to disregard it. The court did not strike out the previous cross-examination relating to defendant's former imprisonment, and that was the prejudicial matter in the cross-examination. Besides even had the court stricken that out, it is doubtful whether thereby the unfavorable impression the jury had received of defendant's character and reputation would have been removed from their minds, so as to cure the error. *Ib.*
4. **Instruction: General Verdict: Separate Offenses.** Burglary and larceny may be joined in the same information, but they are separate and distinct offenses, and upon a trial the jury may acquit of both, or convict of both, or convict of one and acquit of the other; and an instruction that requires them to convict of both or acquit of both, with no instruction or provision for separate verdicts, is error. *Ib.*

CARNAL KNOWLEDGE.

1. **Evidence: Offer of Proof.** In this prosecution for carnal knowledge the accused complains upon appeal that the trial court erred in refusing to permit him to

CARNAL KNOWLEDGE—Continued.

prove acts of unchastity of the prosecutrix prior to the commission of the alleged offense, and in confining him to proof of the prosecutrix's general reputation. *Held*, that the colloquy between court, counsel and witness, as set out in the opinion, does not show such error by the court, and besides, even if the court had ruled as complained of, the Supreme Court could not reverse the case, for the accused did not state what facts he wished to show by his witnesses. The mere statement that he proposed "to prove her unchastity by circumstantial evidence" was no such statement of facts. *State v. Kozlickie*, 301.

2. **Instructions: Facts in Issue.** Where, in a prosecution for carnal knowledge, there was no evidence from which the jury had any right to draw the inference that the prosecutrix had been guilty of acts of lewdness or unchastity, what evidence there was tending to show only that she was sometimes out till midnight with young men at picture shows, and that she talked with men in the bakery, where she worked, an instruction was properly refused which stated that "to establish the unchastity of the prosecuting witness . . . it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by her from which a reasonable inference of her unchastity can be drawn." This instruction would have authorized the jury to find unchastity from evidence which did not show either bad reputation or acts of lewdness or unchastity. *Id.*

CITIES.

1. **Negligence: Employee of Sewer Contractor: Powers of Supervision Reserved by City: Liability of City for Independent Contractor's Negligence.** Powers of supervision and control as to quality of material and methods of construction reserved to the city engineer in a contract for the construction of a sewer, which specified at length and in detail the work to be done and materials to be used, and required all materials and labor to be furnished and paid for by the contractor, who was to be paid for a completed sewer a lump sum, were reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection, and neither the contractor nor his servants have any ground of complaint because the city failed to exercise such power of supervision; nor could an employee of the contractor, engaged in drilling holes to be charged with dynamite and giant powder by the contractor's foreman, look to the city inspector to protect him from unexploded charges; and if the foreman was guilty of negligence in not informing him that the dynamite in a certain charged hole had not exploded, and in consequence he was injured, he cannot hold the city liable for the foreman's negligence and his consequent injuries, on the theory that the city engineer had very extensive powers of supervision and control over the manner of performing the work. Such reserved powers of control did not authorize the engineer to step in between the contractor and his servants, and direct the servant in the details of his work. *Held*, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the relation of independent contractor did not exist unless (1) the city selected a competent and fit person, engaged in an independent calling, to do the work; unless (2) the work committed to the contractor was not attended with danger

CITIES—Continued.

to others, nor unlawful; and unless (3) the contractor was allowed to do the work according to his own methods and only subject to control by the city as to the result of the work. And as the petition charges that the contractor was not competent, skillful or fit, that the blasting of rock in excavating for the sewer was attended with danger to others, and that the contractor was not permitted to do the work according to his own methods, it states a cause of action against the city for the injury to the contractor's servant due to the negligence of his foreman. *Salmon v. Kansas City*, 14.

2. ———: ———: ———: **Power to Direct Discharge of Incompetent Workmen.** Nor did a privilege reserved by the city to require the contractor to discharge incompetent workmen prevent the full application of the doctrine of independent contractor, or make the city liable for the injury of one of the contractor's servants due to the negligence of his foreman. Such provision in the contract was inserted to enable the city to secure good work at the hands of competent workmen; not to protect workmen against incompetent foremen. *Ib.*

3. ———: ———: **Liability of City for Injury to Independent Contractor's Servant: Blasting on Public Street: Intrinsically Dangerous.** Holding in view the rule of law that a municipality cannot authorize acts upon a public street which are intrinsically dangerous and which in themselves constitute a nuisance or a menace to the lives and property of others, and that it is no defense to the liability of the city to show that the performance of the inhibited act is delegated to an independent contractor, it is nevertheless *held* that the protection of the rule does not extend to an employee of an independent contractor who is compelled in excavating for the sewer to use dynamite in blasting rock, nor is blasting so intrinsically dangerous that when the city authorizes its use by an independent contractor it becomes liable for resulting injury. The doctrine is applicable to injuries to passers-by or near-by property. It certainly cannot be invoked to hold liable the city when the injury to the servant of the independent contractor was due to the sheer negligence of the contractor's foreman in failing to protect the servant in work which in itself is not inherently dangerous, namely, in permitting the servant to return to drilling holes without discovering and notifying him that the dynamite in one of the holes of a previous charge had not exploded.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the contractor is not an independent contractor if he is an incompetent and unfit person, and where he is incompetent and unfit the city is liable for any injuries due to his incompetence, and that the rule applies to injuries to passers-by and to servants of the *pseudo*-contractor, and its protection extends to the one as well as to the other.

Held, also, that the use of dynamite in blasting is intrinsically dangerous, and the city is responsible, as for its own negligence, if it fails to see that the contractor uses such care as the hazard requires. *Ib.*

4. ———: ———: ———: **Incompetent Contractor.** The city owes no duty to the servant of an independent contractor with

CITIES—Continued.

whom it has contracted for the construction of a sewer, to provide him a competent and skillful employer. It is no ground for holding the city liable for the servant's injury that the contractor (his employer) was incompetent, or insolvent, and known to the city to be so.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the city does owe to the servant engaged by a contractor to work on a city sewer, the duty to let its contract to a competent and skillful person, and if it fails in that duty it is liable for any injury to such servant due to the negligence of such incompetent contractor or of his foreman. *Salmon v. Kansas City*, 14.

5. ———: ———: ———: **Failure to Enforce Ordinance: Blasting by Person Not Licensed.** A city is not liable in damages for failure to enforce its ordinances. Liability against the city for injury to the servant of an independent sewer contractor, who was injured by the unexpected explosion of a charge of dynamite used in blasting, cannot be predicated upon the city's failure to enforce an ordinance requiring a license to qualify one to do blasting.

Held, by BOND, C., with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that for negligence and breach of duty in failing to require the observance of its ordinance safeguards against injury, which it contracted should be observed, the city is liable. Where the city's contract with the contractor for a district sewer stipulated and covenanted that each and all of its ordinances applicable to the doing of the work should be complied with, including the ordinance regulating blasting and requiring that only competent and licensed persons should engage in that hazardous work, that obligation inured to the benefit of all persons who would be injured by its breach, and the city is liable to any person injured as a result of the neglect of that duty. Such a cause of action, being based on negligence and a breach of contract, is a very different thing from one originating in a non-enforcement of police regulation. *Ib.*

COLLATERAL ATTACK. See *Ejectment*.

COMBINATIONS. See *Quo Warranto*.

CONCEALMENT. See *Fraud*.

CONSTITUTIONAL LAW.

1. **Constitutionality of Statute: Raised by Foreign Corporation.** A foreign corporation which has never been licensed to do business in this State has no right to challenge the constitutionality of a statute which denies to it the right to be admitted to this State. A corporation organized in one State cannot as a matter of right immigrate into another, and no other State is bound to receive it within its borders, and it can enter only upon such terms as the State may see fit to impose; and until it is admitted a statute which imposes onerous conditions or even impossible conditions upon its original admission violates no right of such foreign corporation, and it is only persons whose rights are invaded that can question the constitutionality of a statute. *State ex rel. v. Blake*, 100.

CONSTITUTIONAL LAW—Continued.

2. ———: ———: Invoking U. S. Constitution: Equality of Citizenship. A foreign corporation, which has never been admitted to this State, cannot invoke that part of the U. S. Constitution which says that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," nor that clause in the Fourteenth Amendment which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws." A corporation is not a citizen within the meaning of this constitutional provision, nor is an unadmitted foreign corporation a person within the jurisdiction of the State.
Held, by WOODSON, J., dissenting, that since relator has complied with all the laws of this State except the statutes it claims are unconstitutional and which deny to it a license, it has the same legal right that a domestic corporation has to question the constitutionality of that part of them that denies to it a right to a license. *Ib*.
3. Unconstitutional Law: Invalid in Part: Presumption. The presumption that where a law is unconstitutional in part the whole is invalid, is of doubtful existence. On the contrary, the court approaches the constitutionality of every law with a strong, even a violent, presumption that it is valid; and if the invalid part is separable from the rest, the presumption is that the rest is valid. *State ex rel. v. St. Louis*, 231.
4. ———: Museum of Art Tax: Proviso Invalid: Rest Valid. The Act of 1907, authorizing the city of St. Louis to levy and collect a one-fifth mill tax for a public art museum, and providing that when said act shall have been approved by a vote of the people the mayor, with the approval of the municipal assembly, shall appoint an administrative board of nine members to control the expenditure of the art museum fund, is this far constitutional; but the proviso, namely, that if there be already in such city a legally constituted administrative board of public property devoted by law to the uses of an art museum (referring, as a matter of fact, to an existing board of control of an art museum which had become a part of Washington University), "such board and its successors shall be the board of control of the art museum," and have and expend the public tax, is invalid. But it cannot be said that the proviso furnished the whole legislative inducement for the act, and the invalid proviso being separable from the rest, and ancillary thereto, the rest is valid and constitutional; and it is the duty of the city, since the act has been approved by the people, to levy the tax, and of the mayor to appoint an administrative board. *Ib*.
5. ———: Meaning Ascertained from Title. The title of a law is of significance in getting at its intentment; and the consistency between the title and the main body of the act is important in determining whether the whole was made to depend on a proviso contained in a single section. *Ib*.
6. ———: Vicious Intentment. In getting at and enforcing the intentment of the lawmaker the courts will not hold his intentment to be vicious or his law as amounting to nothing at all, unless driven thereto by imperative reasons. *Ib*.
7. Senatorial Districts: Division of State Into: Legislative in character: State Officers Legislative Body. The dis-

CONSTITUTIONAL LAW—Continued.

tricting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts. *State ex rel. v. Hitchcock*, 433.

8. ———: ———: **By State Officers: Three Essentials.** After a division of the State into senatorial districts has been agreed upon by the Governor, Secretary of State and Attorney-General, and reduced to writing, the Constitution requires three other things to be done before the "statement" shall become effective, namely: first, the members of the body must sign the statement; second, it must be authenticated by the Great Seal of the State and filed in the office of the Secretary of State; and, third, proclamation thereof must be made by the Governor. *Ib.*
9. ———: ———: ———: **Signed by Quorum.** A majority of the three officers authorized by the Constitution to divide the State into senatorial districts, when legally assembled, constitute a quorum to transact business, and a "statement" signed by two of them is legally signed by "the members" within the meaning of the requirement of the Constitution. *Ib.*
10. ———: ———: ———: **Promulgation by Governor: Directory Requirement.** The words of the Constitution declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be binding and effective as if done by the General Assembly," is mandatory, and not merely directory. This court is firmly wedded to the doctrine that constitutional requirements are mandatory rather than directory. It will not undertake to amend the Constitution by whittling it away piecemeal. *Ib.*
11. ———: ———: ———: ———: **Conforms to Other Legislative Requirements.** The said constitutional provision conforms to the general idea that all forms of legislation are supposed to meet with the Governor's approval. *Ib.*
12. ———: ———: ———: ———: **Meaning of the Word Upon.** The word "upon" used in the constitutional provision declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be as binding and effective as if done by the General Assembly," means that the statement or division shall become effective "upon the occasion of," "following upon," "because of," "by reason of," "after and in consequence of" the Governor's proclamation; and that in effect is stating that it shall not become effective until proclamation thereof is made by him. *Ib.*
13. ———: ———: ———: ———: **Presumption that Proclamation was Made.** The language of the Constitution implies an actual proclamation by the Governor—not one by the Attorney-General and Secretary of State. Because the Secretary of State and Attorney-General made up a statement dividing the State into senatorial districts, signed it, and the Great Seal of

CONSTITUTIONAL LAW—Continued.

the State was attached thereto and it was filed in the office of the Secretary of State, as the constitutional provision requires, it will not be presumed that proclamation thereof was made, or that the legal effect was the same as if proclamation had been actually made, in the face of the fact that the Governor did not sign the statement, did not concur in anything that was done, and has persistently refused to make public proclamation of what was done. *Ib.*

14. ———: ———: **Discretionary and Non-Discretionary Powers: Compact: Contiguous, etc.** In the division of the State into senatorial districts the Legislature, or the officers authorized to act upon its failure to act, has no discretion as to three important matters: 1st, as to the number of districts, for there must be 34; 2nd, when a district is to be composed of more than one county, they must be contiguous; and, 3rd, when a district is composed of more than one county, no county shall be divided. The Legislature may exercise a discretion in two matters: 1st, each district is to be made as nearly equal in population as practical, and, 2nd, when a district is to be composed of more than two counties, it shall be as compact as it may reasonably be made; but even that discretion is limited. *Ib.*
15. ———: ———: **Abuse of Discretion: Unequal Population.** Where the population of the State is 3,293,336 and the number of senatorial districts is 34, making the ratio 96,862, and the Constitution requires the population of each district to be "as nearly equal as may be," an apportionment that gives to the city of St. Louis, having a population of 687,029, only six senators, thereby leaving 105,867 persons unrepresented, is an abuse of the legislative limited discretion, and is null and void. But the apportionment of three senators to Jackson county, which had a population of 283,522, was not an abuse of that discretion, for, since no county can be divided, to give it only two would leave a surplus population of 89,798. *Ib.*
16. ———: ———: ———: **Compactness.** Variation in population of the districts, even to the amount of several thousand, will not alone render the apportionment invalid. But where the constitutional requirements both as to equality of population and compactness of territory have not been observed, it is invalid. The counties must be contiguous and as compact as the nature of the work will reasonably permit. *Ib.*
17. ———: ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *Ib.*
18. ———: ———: **By State Officers: Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed,

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or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by those officers. *State ex rel. v. Hitchcock*, 433.

19. ———: ———: ———: Dividing City into Districts: Circuit Court Compelled by Mandamus: Jurisdiction. *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*
20. ———: ———: ———: ———: ———: Both agreeing to Court's Jurisdiction. *Held*, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause. *Ib.*
21. ———: ———: ———: ———: ———: Obiter Dictum. *Held*, by GRAVES, J., that the constitutional power vested in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; *and*, as the majority opinion specifically holds that the Supreme Court is, on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum*, pure and simple, and binding on no case. *Ib.*
22. Attorney: Right to Practice: Property Right. The right of an attorney to practice law is a valuable property right, which cannot be taken from him by an arbitrary act of the court; but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense. *State ex rel. v. McElhinney*, 592.

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23. ———: ———: ———: **Arbitrary Order: Due Process of Law.** An arbitrary order of a court depriving a duly licensed attorney of his right to practice law is not due process of law, and under both the State and Federal Constitutions such order would be null and void. *Ib.*
24. ———: ———: **Probate Judge: Motion to Practice.** But where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof. *Ib.*

CONTRACTS.

1. **Cancellation: Unwise.** If a contract made by a corporation was made in good faith and by lawful authority it cannot be set aside by the court at the suit of the minority stockholders and minority directors on a showing that it was unwise or that it gave to the other party the advantage. Corporations, like individuals, make bad bargains, but the courts will not for that reason set their contracts aside. *Trendley v. Railroad.* 73.
2. **Cancellation: Equity: Forfeiture: Pleading: Decree.** Where the petition to have cancelled a modification of a contract between an express company and a railway company, states that the contract has been forfeited by the railway company and asserting that it would be inequitable to permit it to be forfeited and praying that the forfeiture and modification be annulled and that the railway company be compelled to continue to perform the original contract, to which the railway company files a general denial, a dismissal of the bill and a refusal to cancel the modified contract completely disposes of the question of forfeiture; and it was not good pleading for defendant to justify the forfeiture in its answer by way of a cross-bill, in the equity suit, but since the dismissal of the bill disposes of the question of forfeiture, that part of the decree declaring the contracts forfeited may be ignored. *Ib.*
3. **Grading: Amount of Overhaul: Engineer's Interpretation.** Under plaintiffs' contract to grade 200 acres of land, they were to be paid eighteen cents per cubic yard when the average haul was 1400 feet, and in addition three-fourths of one cent per cubic yard for every 100 feet of average haul in excess of 1400 feet. The contract required the plaintiffs to do the work "in accordance with directions which may from
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time to time be given by the engineer for the party of the second part in charge of the work;" also that "the engineer's opinion as to the increase of haul is to be binding on both contracting parties;" but "that nothing herein contained shall be construed to affect the right of the party of the second part, hereby reserved, to reject the whole or any portion of the work should the engineer's certificate of the amount and value of the work be found or known to be inconsistent with the terms of this agreement or otherwise improperly given." *Held*, that the apparently inconsistent clauses of the contract can be reconciled only by holding that the opinion of the engineer in matters pertaining to the science of engineering should be binding on both parties, but it did not give to him power to judge the law of the case, and his certificate was not binding on either party if it was contrary to the terms of the contract; *and*, since he testified that he did not object to the way plaintiffs did the hauling and that he measured the overhaul not by the way it was actually done, but in the way he thought it might have been done, and that if his certificate were accepted the plaintiffs would lose \$50,000 on the work, his certificate is not final as to the value of the work. He had no power to substitute for the actual overhaul done the overhaul which might have been effected with different means and under a different plan of operation. He had no power to construe the contract to mean what it did not say. Its interpretation is for the court. *Scott v. Realty Co.*, 112.

4. ———: ———: ———: Means to be Employed: Contractor's Right Where Contract is Silent. Where a grading contract provided that the contractor should be paid eighteen cents per cubic yard when the average haul was 1400 feet and three-fourths of a cent in addition for every 100 feet of average haul in excess of 1400 feet, and the contract did not specify the appliances to be used for hauling, the contractor had the right to decide what was the most economical and expeditious manner of doing the work. Instead of doing it with spades, scrapers, wagons and teams, he had a right to do it with steam shovels, engines and cars, on a railroad track erected by him for that purpose. *Ib*.
5. ———: ———: ———: No Objection Amounts to Consent. And where the engineer was on the ground and saw how the haul was being done, and did not object to the method being used, his failure to object amounted to consent to the use of the steam shovels, cars and railroad track; and since under the contract the engineer was the landowners' vice-principal, his consent was theirs. *Ib*.
6. ———: Settlement: No Counterclaim. Where the counterclaim pleaded by defendant—to-wit, that liquidated damages at the rate of \$500 a day if the work was not completed within a given time were to be deducted—was not supported by any evidence that it was taken into account when the settlement was made, but all the evidence is that the defendant in the negotiations took the position that it would pay only what the engineer certified was due and no more, and his estimates of what defendant owed did not include that item, there is no such accord and satisfaction as bars a reopening of the account. The settlement was not a compromise, because defendant conceded nothing. *Ib*.

CONTRACTS—Continued.

7. ———: ———: ———: **Receipt in Full: Exception.** Part payment of a debt is not a discharge of the whole obligation, even when the creditor gives a receipt in full. But an exception to that rule is that, when there is an account between the creditor and debtor sufficiently involved to afford the basis of a fair dispute as to the amount due, and after full consideration the creditor yields to the debtor's view and agrees to accept the amount which the debtor concedes to be due and gives a receipt in full, and there is no other controlling consideration or matter, the settlement is binding, for then it comes under the head of account stated. *Ib.*
8. ———: ———: ———: **Threatened Insolvency: Misrepresentation: Coercion.** Where the defendant conceded a certain sum to be due plaintiffs and told them they could accept that or nothing, and plaintiffs informed the defendant's president that they were going to sue for the amount they claimed to be due, and he thereupon said it would suit the company just as well to be sued, because if the company should settle then it would have to borrow the money it proposed to pay, whereas a lawsuit would last three years or longer, and in the meantime if the company was successful in disposing of its property it would have enough to pay the whole of plaintiff's claim or else it would be insolvent and plaintiffs would get nothing; and plaintiffs looked up the matter and were satisfied the prospect of insolvency as foreshadowed by the president was correct, and they then yielded to defendant's demand and settled, giving a receipt in full, but thereafter upon further investigation they ascertained that the representation as to insolvency was not true, the settlement is not such an accord and satisfaction as bars plaintiffs from recovering what is due them, for the president thereby introduced an element of coercion into his offer, and did not deal fairly with his creditor, and hence is not entitled to the advantage so obtained. *Ib.*
9. ———: ———: ———: **Concealment.** A concealment of the available assets of a corporation by its president, in his discussion of the company's solvency and ability to pay its debt to plaintiffs, when because of his representation that it was insolvent plaintiffs were induced to give a receipt in full of their claim, is a material fact bearing on the question of the fairness of the alleged settlement, whether the concealment was intentional or not. *Ib.*
10. ———: ———: ———: **Coercion: Misrepresentations: Fraud.** Where plaintiffs sue for the balance due on account, and defendant pleads settlement, and plaintiffs reply that the settlement was coerced by defendant's representations that it was insolvent, it is no defense that such representations were true and therefore there was no fraud. Such a suit is not a case of obtaining goods under false pretense. It is the case of a debtor, professedly able then to pay what he conceded to be due, refusing to pay it, and coercing his creditor to execute a receipt in full by holding up to him the prospective insolvency of the company. If the settlement was coerced under such circumstances it was not fair, and whether it was so obtained is a question of fact for the jury. *Ib.*
11. **Fiduciary Relation: Insurance Company: Agent.** A general agent for an insurance company made a contract with

CONTRACTS—Continued.

the company by the terms of which all funds received by the agent were trust funds, not to be used by the agent, but to be remitted to the company. *Held*, that the relation thus formed was a fiduciary one, which was not altered in practice by the fact that when the agent settled with the company under his previous contract containing the same terms, he failed to account for certain first-premium notes and the company allowed him special favors in order to pay for those notes, and that an official of the company soon after the making of the last contract directed the agent to cash all premium notes at once—and this view is strengthened by the fact that after the last contract was made the company wrote the agent a letter calling his attention to the fiduciary clause, censuring him for selling a premium note and failing to reimburse the maker when rejected, and warning him that his conduct was an unlawful conversion of another's property. *Hanna v. Insurance Co.*, 383.

12. **Principal and Agent: Insurance: Authority to sell premium Notes.** Authority to a general insurance agent to sell premium notes is not permission to convert the proceeds to the agent's own use. *Ib.*
13. **Place of Making: Law Governing: Conflict of Laws.** Where the initial and consummate stages of the formation of a contract of insurance were begun and ended in Missouri; the application for insurance made there; the contract delivered there, and the premium there paid upon which the obligation of the contract depended, then the contract is a Missouri contract and must be construed by the laws of this State. *Head v. Insurance Co.*, 403.
14. **Subsidiary Contracts.** All subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. Therefore, where a contract of insurance was originally made in Missouri and governed by its laws, and where the present beneficiary in 1904 entered into a loan agreement whereby she borrowed from the defendant insurance company \$2270, and wherein she agreed that the policy in question should be governed and controlled by the laws of the State of New York, such loan agreement does not constitute a new and valid contract which precludes the present beneficiary from any other redress under the policy than she would be entitled to if it had been settled in accordance with the laws of New York. *Ib.*
15. **Tender or Payment of Part of Unquestioned Sum Due: Accord and Satisfaction.** The payment or tender, under a policy of insurance, of a sum less than the full amount of the unquestioned sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount due. *Ib.*
16. **Payment: Walver by Beneficiary.** The return to a beneficiary of a policy of insurance upon which a loan had been made, with an indorsement upon the policy that it should be taken for a certain amount of paid up insurance, and the retention of the policy for some time by the beneficiary, does not constitute a walver of the beneficiary's right to demand a further sum due her under the policy, when she had no knowledge of her legal rights thereunder, never accepted the sum

CONTRACTS—Continued.

tendered her, transacted none of the business relating to the insurance, and had done nothing, in fact, except to place the policy, when returned, among the papers of the insured. *Ib.*

CONVEYANCES.

1. **Color of Title: Defective Deed.** A deed which describes none of the land to which defendant seeks to prove title by limitations, can afford no color of title beyond the bounds of defendant's actual possession. *Slicer v. Owens*, 319.
2. **———: Corrected Deed.** A deed given in correction of one which did not describe any of the land in suit, will not constructively extend the grantee's prior possession to parts of the land over which he exercised no dominion. *Ib.*
3. **Absolute Deed: Trust Estate: Parol Proof.** Deeds absolute and unconditional on their faces cannot be shown by oral evidence to be conveyances in trust. The statute requires an express trust to be evidenced by some writing—which may be either the conveyance itself, or a separate writing. *Mugan v. Wheeler*, 376.
4. **Easement: Implied: Necessity.** An implied easement must rest upon a reasonable necessity. If there is another reasonable way of entrance over the grantee's own land on to the lot conveyed to him, an easement by implication will not be impressed upon the property adjoining, simply because that easement was there when both lots were owned by a common grantor and had been used by his tenants for a long number of years as a means of entrance upon the lot. So long as the element of necessity or reasonable necessity is lacking, the rule relating to dominant and servient estates does not apply. Unless the easement is necessary to the beneficial enjoyment of the property conveyed it will not be implied from a conveyance of the lot benefited by the existing easement by a deed which does not mention the easement. *Bussmeyer v. Jablonsky*, 681.
5. **———: ———: ———: Deed: Appurtenance.** Deeds are to be construed as meaning what the language in them imports. The deed describing lots by number, or by metes and bounds, cannot be held to include as an appurtenance an easement upon an adjoining lot, conveyed by the same common grantor, unless the easement is necessary to the enjoyment of the lot in favor of which it is claimed—a necessity that must be implied from the arrangement, nature and the long continued uses to which the segregated lots have been put and are from their nature to be put. It can never be implied from considerations of convenience. *Ib.*
6. **———: ———: ———: Passage Way Between Houses.** There had been a hall or passage way between lots 7 and 8, which extended from the western line of lot 7 four feet to the building on lot 8, and was used as a means of entrance upon the rear of both lots, and had been so used for many years by the tenants of the common grantor, when he conveyed lots 8, 9, 10, 11 and 12 to plaintiff, and lots 5, 6 and 7 to defendant, describing them by number and by metes and bounds, and omitting all reference to the passageway. There was a street in front of the lots and an alley at the rear, and in the west side of the building on lot 8 there were three doors opening upon

CONVEYANCES—Continued.

lot 9, and plaintiff testified that he could use lot 9 and those doors as a means of entrance upon the rear of lot 8 "only" because lot 9 was his "own ground." *Held*, that the passageway was not a strict necessity, or a reasonable necessity to a proper use of lot 8, but a matter of convenience, and being wholly on lot 7 conveyed to defendant, no easement can be implied. *Bussmeyer v. Jablonsky*, 681.

CORPORATIONS.

1. **Combination: Established by Pleading.** The mere allegation that a combination exists between two railroad companies is not sufficient to establish such combination. *State ex inf. v. Railroad*, 1.
2. ———: ———: **Control by Ownership of Stock.** One railroad company cannot in law be said to control another where its ownership of the other's stock, if exercised, can amount to no more than the election of two of its thirteen directors. Nor can a charge of a control and combination deduced from such ownership be considered other than a conclusion of the pleader. Nor does the fact of such percentage of ownership support the conclusion, either of control or ownership. *Ib.*
3. **Railroads: Ownership of Stock: Connecting Lines.** The ownership of the stock of one railroad company by another connecting line does not violate the law. *Ib.*
4. ———: **Ownership of Express and Refrigerator Companies.** A railroad company may own the stock of an express company organized as a carrier of express freight, and also the stock of a refrigerator car company which owns cars devised and used for the transportation of products which require refrigeration while in transit. The railroad company could engage in such express and refrigerator transportation business itself, and what it may do directly it can do indirectly by owning the stock of the companies engaged directly in the business. But under the law, it is the duty of the railroad company to permit any express company to operate upon its lines. *Ib.*
5. ———: **Combination: Stockholders in Several Defendant Companies: Not Before Court.** An allegation in the information that certain stockholders own a majority of the stock of one of the respondent railroad companies, which in turn owns some of the stock of the other two railroad companies and of the express company and the refrigerator car company, and that such stockholders have conspired together to control all the respondents, will not justify a writ of ouster against the respondent companies, where such individual stockholders are not made parties, and therefore are not before the court. *Ib.*
6. **Contract: Cancellation: Unwise.** If a contract made by a corporation was made in good faith and by lawful authority it cannot be set aside by the court at the suit of the minority stockholders and minority directors on a showing that it was unwise or that it gave to the other party the advantage. Corporations, like individuals, make bad bargains, but the courts will not for that reason set their contracts aside. *Trendley v. Railroad*, 73.

CORPORATIONS—Continued.

7. ———: ———: **Fraud.** An express company had a contract with the Suburban Railway Company whereby the express company was granted the exclusive right to do an express business over the lines that the railway company then owned or might thereafter acquire, and that contract was at a subsequent date so modified as to relinquish the exclusive feature of the contract and to authorize the Suburban Company to make a contract with the Illinois Traction Company allowing the latter to pass its cars carrying through-express freight over certain lines of the Suburban Company.. It is this modification of the original contract that is the matter in suit, and the plaintiffs, who are minority stockholders and minority directors of the express company, claim that the modification was so unfavorable to the express company as to sustain the allegation that it was the result of fraud on the part of its president and other directors entrusted with the duty of protecting the company. The Traction Company owned a large system of completed interurban electric railways coming from Springfield, Illinois, to St. Louis, and when the contract was modified was constructing a line which if completed would reach from Edwardsville to East St. Louis and carry both local and through-express freight, but it wished to cover the route by use of the Suburban tracks, without building that line. If that line were built the Traction Company would have hauled express freight, and would have been a more formidable competitor of the express company from Edwardsville to East St. Louis than it would have been if the concession to carry only through freight over the Suburban were made, which concession the modification of the contract permitted to be made, and by that modification the express company relinquished its exclusive right to carry through-express freight between Edwardsville and East St. Louis over the Suburban, but acquired the right to run express cars between those two cities, and between Alton and East St. Louis. *Held*, that these facts show that the charge of fraud against the majority directors was unfounded. *Ib.*
8. ———: ———: **Reduction of Capital by Unwise Contract.** A board of directors cannot increase or reduce the capital stock of a corporation, but that rule does not prevent the directors from modifying a contract which constitutes a large per cent of the company's assets, even though it be ninety per cent, and the modification results in great loss to the company. Nor can the board of directors, unless authorized thereto by the stockholders, put an end to the company's business and defeat the objects of its creation by selling in mass all its property and good will; but where the modification of an existing contract had no such purpose, and the evidence tends to show that if the majority of the directors had been left alone to carry on its business under the modified contract, and had not been harassed by hurtful suits brought by the minority directors and stockholders, the corporation might have entered upon a successful business career, it will not be held that the board of directors did not have authority to make the modified contract. *Ib.*
9. ———: ———: **Special Meeting: Specified in Notice.** A notice specifying that the purpose of the special meeting of the board of directors would be to authorize the president to sign and enter into a certain contract "bearing date July 16, 1906," sufficiently specifies that the purpose was to execute

CORPORATIONS—Continued.

a contract bearing that date, which after being redrafted and dated July 18th, but not otherwise changed, was then signed—especially where all the directors were present. *Trendley v. Railroad*, 73.

10. **Directors: Lawful Meeting: Trapped Into Being Present.** A director cannot be trapped into a meeting of the board against his will; and though the meeting is held on the day and at the hour fixed by the by-laws, yet if his presence is necessary to make a majority and he took no part in the meeting, it was not legal. So that where the by-laws provided for a regular meeting at ten a. m. on the first Monday of each month, at the company's office, which was rarely observed, and at that hour on a certain first Monday two of the five directors called at the office where another was in charge and stated to him that they had come to hold a directors' meeting, and he left, though counted by them as present, and no notice had been given of such meeting to either him or the other directors and no meeting was expected, said meeting was not legal. *Ib.*
11. **Contract: Cancellation: Equity: Forfeiture: Pleading: Decree.** Where the petition to have cancelled a modification of a contract between an express company and a railway company, states that the contract has been forfeited by the railway company and asserting that it would be inequitable to permit it to be forfeited and prays that the forfeiture and modification be annulled and that the railway company be compelled to continue to perform the original contract, to which the railway company files a general denial, a dismissal of the bill and a refusal to cancel the modified contract completely disposes of the question of forfeiture; and it was not good pleading for defendant to justify the forfeiture in its answer by way of a cross-bill, in the equity suit, but since the dismissal of the bill disposes of the question of forfeiture, that part of the decree declaring the contracts forfeited may be ignored. *Ib.*
12. **Receivers: Distribution of Proceeds: No Objection to Order Until After Appeal.** Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiffs may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands, and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree. *Ib.*
13. **Fraudulent Conveyance: Payment for Capital Stock.** R organized a corporation, of which he owned all but two shares of the stock, paying for the stock by conveying real estate to the corporation. His wife joined with him in conveying her homestead and dower interest in the property only upon agreement by the corporation that her interest should be reconveyed to her in other property whenever the homestead property should be sold by the company. After the corporation had become insolvent it conveyed the

CORPORATIONS—Continued.

property in suit to a trustee for R's wife. *Held*, that the conveyance to the trustee was voluntary, without consideration and a fraud on the plaintiff, a creditor of the corporation. The corporation had no power to make any agreement to return any consideration paid for its capital stock. *Davis v. Realty Co.*, 256.

14. **Limitations: Deferred: "Improper Act:"** Sec. 1905, R. S. 1909. The plaintiff's petition alleges, that the defendant corporation wrongfully got possession of its note payable to plaintiff and refused to allow plaintiff to see it; that the president of the corporation was plaintiff's brother, who convinced plaintiff that the note was signed by him instead of by his corporation; that plaintiff, thus deluded, sued her brother upon the note in 1902, in good time; and, finally, that while defendant corporation knew of the pendency of plaintiff's suit against her brother as maker of the note, it used all means to prevent her from learning the truth about the note until after the Statute of Limitations had run. *Held*, that the petition stated such improper acts on the part of defendant corporation as would defer the running of the Statute of Limitations in accordance with Sec. 1905, R. S. 1909. *Sonnenfeld v. Millinery Co.*, 309.
15. **Libel: Owners of Corporation: Reference to Plaintiff.** The defendant on June 22nd published in its newspaper an interview with the Attorney-General in which these words were used: "These men are engaged in the commission of a felony, and the owners of the race track are equally guilty with the bookmakers under the statute"—bookmaking being then a felony. The plaintiff had then been in Europe since May 1st. The race track was owned by a corporation, in which plaintiff was a stockholder; and the property itself by two other corporations, in one of which he was a stockholder. During the year he was not in active management of either corporation, but he and two others were recognized as owners, and defendant so recognized them. Before his departure for Europe he and the other two discussed the future running of the race track, and he says the matter was left to them to do as they pleased, and he gave instructions before leaving to sue defendant if he was libeled by it, and the suit was brought before he saw the publication. *Held*, that the proof shows that the publication refers to plaintiff and the readers thereof so understood it, as three of them who had inside knowledge of the owners testified they so understood it. *Tilles v. Publishing Co.*, 609.

COURTS.

1. **Insanity: Probate Court: Jurisdiction.** Probate courts have full jurisdiction to pass upon the sanity of persons brought before them to answer informations charging unsoundness of mind. The Constitution (Sec. 34, Art. 6) expressly authorizes probate courts to appoint guardians and curators for persons of unsound mind, and that power implies the power to pass upon the sanity of the person for whom such guardian or curator is to be appointed. *Ex parte Zorn*, 267.
2. **Malicious Prosecution: Duty of Court and Jury.** When the facts in an action for malicious prosecution are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions. *Hanna v. Insurance Co.*, 383.

COURTS—Continued.

3. **Legislative Action: Senatorial Districts: Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *State ex rel. v. Hitchcock*, 433.
4. ———: ———: **By State Officers: Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by those officers. *Ib.*
5. ———: ———: ———: **Dividing City into Districts: Circuit Court Compelled by Mandamus: Jurisdiction.** *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*
6. ———: ———: ———: ———: ———: **Both Agreeing to Court's Jurisdiction.** *Held*, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause. *Ib.*
7. ———: ———: ———: ———: ———: **Obliter Dictum.** *Held*, by GRAVES, J., that the constitutional power vested in

COURTS—Continued.

the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; and, as the majority opinion specifically holds that the Supreme Court is, on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum*, pure and simple, and binding on no one. *Ib.*

8. **Probate Court: Term: Alteration of Time.** Under the Laws of 1877, page 230, section 7, and the Revised Statutes of 1855, page 1601, section 9, the probate court of St. Louis county, at the June term, 1877, and on July 28th of that year, had express authority to make and enter of record an order changing the time for holding its stated terms, and to fix upon the second Monday in September and the first Mondays of December, March and June as the times for the beginning of the regular terms of the court. *Brown v. Marshall*, 707.
9. ———: ———: ———: **Before Act of 1877 Went into Effect.** Even if the order changing the times for the beginning of the terms of the probate court of St. Louis county, made on July 28, 1877, was made one day prior to the time the Act of 1877 went into effect, the Act of 1855 (R. S. 1855, p. 1601, sec. 9) was then in force, in almost the same words, and was ample authority for the order, since the Act of 1877 did not purport to repeal any of the Act of 1855 except "all acts and parts of acts inconsistent with this act," and there is nothing inconsistent between the two, and besides the Act of 1877 was but a continuation of the Act of 1855. *Ib.*
10. ———: ———: ———: ———: **Statutory Construction: Continuation of Existing Act.** A subsequent act repealing and re-enacting at the same time a pre-existing act is but a continuation of the latter, and the law dates from the passage of the first act and not from the date of the latter. *Ib.*
11. ———: ———: ———: **By Probate Court of County of Terms of City Court: Separation.** The separation of the city of St. Louis from the county of St. Louis in 1876 did not affect the origination, jurisdiction or location of the probate court of St. Louis county then existing. The probate court of St. Louis county had authority at its July term, 1877, to change the time for beginning the regular terms of the probate court of St. Louis city. That was not an attempt by one court to make an order changing the terms of another court. Prior to the division of the county into the city and county of St. Louis, the county seat, courts, offices and public buildings of the county of St. Louis were in the city of St. Louis, and those courts continued and remained in the city after the segregation of the present county; and the change from the probate court of the county of St. Louis to the probate court of the city of St. Louis was a change only in name, with the single exception that, after the Act of April, 1877, creating a probate court for the segregated county of St. Louis, the territorial jurisdiction of the city court was *pro tanto* curtailed. In all other respects it con-

COURTS—Continued.

tinued with the same officers, the same habitat and the same jurisdiction. *Brown v. Marshall*, 707.

12. **Administrator's Sale: Of Real Estate to Pay Debts: Disapproved: Renewal of Order at Subsequent Term.** Where a valid order to sell the real estate to pay decedent's debts has, after proper statutory notice to the heirs and parties interested has been given, been made, and the sale made in pursuance thereof has been disapproved because of the inadequacy of the price obtained, it is not necessary to the validity of a renewal order to sell that such renewal order be made at the same term, or that the heirs and interested parties be given further notice before the renewal order is made at a subsequent term. Whenever a party is duly summoned into court for a particular purpose he remains there until that purpose is finally accomplished or disposed of, or until he is otherwise discharged according to law. *Ib.*

CRIMINAL LAW.

1. **Witness: Coindictee: Not Indorsed on Indictment.** A witness who was jointly charged by information with defendant, and whose name is not indorsed on the information, is competent to testify for the State in the separate trial of defendant, after a *nolle prosequi* has been entered as to such witness. *State v. Conway*, 271.
2. **Burglary and Larceny: Sufficient Evidence.** Where the evidence showed that both the burglary and larceny had been committed by some one, and a gold watch and two or three hundred dollars in money taken, and there is testimony that defendant was in possession of the watch shortly after the burglary was committed, the evidence is sufficient to take the case to the jury as to both the burglary and larceny. *Ib.*
3. ———: **Instruction: Not Preserved in Bill.** The action of the court in refusing instructions on the subject of alibi, set out in the record proper but not made a part of the bill of exceptions, is not for review on appeal. *Ib.*
4. ———: **Cross-Examination of Witness: Former Penitentiary Record of Defendant: Collateral Matter: Alibi.** The defendant was charged with burglary and larceny of money and a watch, and interposed an alibi as a defense. The State had shown that a short time after the burglary defendant had gone to a saloon and exchanged ten dollars in silver for a ten-dollar bill. For the purpose of accounting for the fact that he had ten dollars in his possession, defendant called a witness who testified that defendant was usually employed and that he had been employed in another city for three or four years preceding the date of the offense. The prosecuting attorney, on cross-examination, asked the witness if he did not know that defendant was in the penitentiary during the time he had testified he was in said city. The defendant had not testified and had not introduced evidence of good character. *Held*, that it was error to permit the prosecuting attorney to cross-examine the witness as to defendant's former imprisonment. *Ib.*
5. ———: ———: ———: ———: ———: **Cured by Direction to Disregard.** On cross-examination the witness testified that he had

CRIMINAL LAW—Continued.

heard persons say that defendant was in the penitentiary during the time witness had on direct examination testified he was in another city, and after defendant's motion to strike out this answer was overruled the court, of its own motion, said: "That part which he heard will be stricken out and will not be considered by the jury." *Held*, that the error in permitting the prosecuting attorney, on cross-examination, to ask the witness if defendant was not in the penitentiary during the time he had testified he was in another city, was not cured by the action of the court in striking out what the witness heard and directing the jury to disregard it. The court did not strike out the previous cross-examination relating to defendant's former imprisonment, and that was the prejudicial matter in the cross-examination. Besides even had the court stricken that out, it is doubtful whether thereby the unfavorable impression the jury had received of defendant's character and reputation would have been removed from their minds, so as to cure the error. *Ib*.

6. ———: **Instruction: General Verdict: Separate Offenses.** Burglary and larceny may be joined in the same information, but they are separate and distinct offenses, and upon a trial the jury may acquit of both, or convict of both, or convict of one and acquit of the other; and an instruction that requires them to convict of both or acquit of both, with no instruction or provision for separate verdicts, is error. *Ib*.
7. ———: ———: **No Exception: No Request.** Although no exception was saved to an erroneous instruction given for the State, or to a failure to instruct on all the law of the case, and no other objection was made except that in the motion for a new trial it was assigned as error that the court "erred in failing to instruct on the whole law governing the case," the defendant is entitled to a reversal of the judgment of conviction of both larceny and burglary on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict," as the statute (Sec. 5231, R. S. 1909) specifically requires. The court should have given instructions providing for a separate verdict as to the distinct offenses, whether requested or not, and whether or not an exception was saved to its failure to do so, a failure to so instruct will work a reversal on appeal. *Ib*.
8. ———: ———: ———: **Non-Direction.** Non-direction, with or without exceptions saved, is error in a felony case. There is an inherent difference in this regard between civil and criminal cases, some of which are enumerated in the opinion. Besides, the statute specifically requires instructions to the jury, "whether requested or not, upon all questions of law arising" in a criminal case "which are necessary for their information in giving their verdict;" and into that statute cannot be read the proviso that non-direction in a felony case is not error which will warrant a new trial unless it affirmatively appear that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to its failure to so instruct. *Ib*.
9. ———: ———: ———: ———: **In Felony Cases: Statute.** The provision in said Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside

CRIMINAL LAW—Continued.

the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case. *State v. Conway*, 271.

10. —: —: —: —: Motion for a New Trial: General Assignment: Usually Insufficient: Exception. The motion for a new trial should call the court's attention to the specific point of law on which it is claimed the court failed to instruct; otherwise, it will ordinarily be insufficient; but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of justice, will grant a new trial, though the point be presented in it for the first time. *Ib.*
11. Information: Incurrigible Girl: Individuating Offense. The statute (Sec. 1546, R. S. 1909) designating the character of girls that may be committed to the State Industrial Home does not individuate the offense, and it is therefore necessary that the information set out the facts which constitute the alleged offense. An information charging that the sixteen-year-old girl "was then and there unlawfully incurrigible to such an extent that she could not be controlled by her parents and guardians, and that her associations were immoral and criminal and bad and vicious" is not sufficient to support a judgment. *Ex parte See*, 292.
12. Judgment: Incurrigible Girl: No Finding of Facts. A judgment that fails to show that any trial was had or that defendant was found guilty of any offense covered by the statute is insufficient. A judgment which does not find that the girl was incurrigible, or that her associations were immoral or criminal, or bad or vicious, but simply finds that "she is a fit subject to be committed to the State Industrial Home for Girls," will not authorize the sheriff to deprive her of her liberty. *Ib.*
13. Evidence: Carnal Knowledge: Offer of Proof. In this prosecution for carnal knowledge the accused complains upon appeal that the trial court erred in refusing to permit him to prove acts of unchastity of the prosecutrix prior to the commission of the alleged offense, and in confining him to proof of the prosecutrix's general reputation. *Held*, that the colloquy between court, counsel and witness, as set out in the opinion, does not show such error by the court, and besides, even if the court had ruled as complained of, the Supreme Court could not reverse the case, for the accused did not state what facts he wished to show by his witnesses. The mere statement that he proposed "to prove her unchastity by circumstantial evidence" was no such statement of facts. *State v. Kozlickie*, 301.

CRIMINAL LAW—Continued.

14. **Instructions: Carnal Knowledge: Facts in Issue.** Where, in a prosecution for carnal knowledge, there was no evidence from which the jury had any right to draw the inference that the prosecutrix had been guilty of acts of lewdness or unchastity, what evidence there was tending to show only that she was sometimes out till midnight with young men at picture shows, and that she talked with men in the bakery, where she worked, an instruction was properly refused which stated that "to establish the unchastity of the prosecuting witness . . . it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by her from which a reasonable inference of her unchastity can be drawn." This instruction would have authorized the jury to find unchastity from the evidence which did not show either bad reputation or acts of lewdness or unchastity. *Ib.*
15. **Embezzlement: Trust Fund: Failure to Account: Evidence.** The statute defining embezzlement does not make the failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund. The failure to account may, however, be material evidence tending to establish the act of conversion. *Hanna v. Insurance Co.*, 383.
16. ———: **Definition.** Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. *Ib.*
17. ———: **Proof Covering Part Only of Sum Charged.** The general agent for an insurance company was prosecuted for embezzling three first-premium notes. He took these notes payable to himself, immediately cashed them, paid the sub-agents their commissions and, in violation of his contract with the company making all funds in his hands fiduciary, converted the remainder to his own use. When the applications with which the three premium notes were taken, were rejected, the sub-agents refunded to the general agent. The agent asserted upon the trial that before this refunding by the sub-agents he had made a claim against the company for reimbursement for sums advanced on account for sub-agents in other transactions and that therefore the money so refunded to him could be retained and he could not be guilty of embezzlement because the whole amount charged had not been converted. *Held*, that a prosecution for the embezzlement of a certain sum can be sustained by showing the embezzlement of any portion of that sum. *Ib.*
18. ———: **When Offense is Completed: Efforts to Atone.** The offense of embezzlement is complete at the time of conversion and is not tolled by subsequent claims or efforts at atonement. *Ib.*
19. ———: **Conversion: Evidence: Criminal Intent.** Where in a prosecution for embezzlement the admitted facts show a conversion of part of the items charged before any counterclaim was made or entertained by the defendant, such conversion is a fact from which the jury would be authorized to infer a criminal intent. *Ib.*

DEPARTURE. See Pleading.

EASEMENT.

1. **Implied: Necessity: Conveyance.** An implied easement must rest upon a reasonable necessity. If there is another reasonable way of entrance over the grantee's own land on to the lot conveyed to him, an easement by implication will not be impressed upon the property adjoining, simply because that easement was there when both lots were owned by a common grantor and had been used by his tenants for a long number of years as a means of entrance upon the lot. So long as the element of necessity or reasonable necessity is lacking, the rule relating to dominant and servient estates does not apply. Unless the easement is necessary to the beneficial enjoyment of the property conveyed it will not be implied from a conveyance of the lot benefited by the existing easement by a deed which does not mention the easement. *Bussmeyer v. Jablonsky*, 681.
2. ———: ———: **Deed: Appurtenance.** Deeds are to be construed as meaning what the language in them imports. The deed describing lots by number, or by metes and bounds, cannot be held to include as an appurtenance an easement upon an adjoining lot, conveyed by the same common grantor, unless the easement is necessary to the enjoyment of the lot in favor of which it is claimed—a necessity that must be implied from the arrangement, nature and the long continued uses to which the segregated lots have been put and are from their nature to be put. It can never be implied from considerations of convenience. *Ib.*
3. ———: ———: **Passage Way Between Houses.** There has been a hall or passage way between lots 7 and 8, which extended from the western line of lot 7 four feet to the building on lot 8, and was used as a means of entrance upon the rear of both lots, and had been so used for many years by the tenants of the common grantor, when he conveyed lots 8, 9, 10, 11 and 12 to plaintiff, and lots 5, 6 and 7 to defendant, describing them by number and by metes and bounds, and omitting all reference to the passageway. There was a street in front of the lots and an alley at the rear, and in the west side of the building on lot 8 there were three doors opening upon lot 9, and plaintiff testified that he could use lot 9 and those doors as a means of entrance upon the rear of lot 8 "only" because lot 9 was his "own ground." *Held*, that the passageway was not a strict necessity, or a reasonable necessity to a proper use of lot 8, but a matter of convenience, and being wholly on lot 7 conveyed to defendant, no easement can be implied. *Ib.*

EJECTMENT.

School Fund Mortgage: Void Sale: Collateral Attack. The defendant in an action of ejectment, to which she has answered by a general denial, has the right to defend her possession, and when plaintiff offers proof of his title, to object to it for infirmities apparent on its face. Defendant in such case does not seek to have annulled the sheriff's deed under which plaintiff claims, made in the foreclosure of a school fund mortgage without an order of court, nor does she make a collateral attack upon that deed, but she simply requires plaintiff to make legal proof of his title. *Neil v. Tubb*, 666.

EMBEZZLEMENT.

1. **Trust Fund: Failure to Account: Evidence.** The statute defining embezzlement does not make the failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund. The failure to account may, however, be material evidence tending to establish the act of conversion. *Hanna v. Insurance Co.*, 383.
2. **Definition.** Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. *Ib.*
3. **Proof Covering Part Only of Sum Charged.** The general agent for an insurance company was prosecuted for embezzling three first-premium notes. He took these notes payable to himself, immediately cashed them, paid the sub-agents their commissions and, in violation of his contract with the company making all funds in his hands fiduciary, converted the remainder to his own use. When the applications with which the three premium notes were taken, were rejected, the sub-agents refunded to the general agent. The agent asserted upon the trial that before this refunding by the sub-agents he had made a claim against the company for reimbursement for sums advanced on account for sub-agents in other transactions and that therefore the money so refunded to him could be retained and he could not be guilty of embezzlement because the whole amount charged had not been converted. *Held*, that a prosecution for the embezzlement of a certain sum can be sustained by showing the embezzlement of any portion of that sum. *Ib.*
4. **When Offense is Completed: Efforts to Atone.** The offense of embezzlement is complete at the time of conversion and is not tolled by subsequent claims or efforts at atonement. *Ib.*
5. **Conversion: Evidence: Criminal Intent.** Where in a prosecution for embezzlement the admitted facts show a conversion of part of the items charged before any counterclaim was made or entertained by the defendant, such conversion is a fact from which the jury would be authorized to infer a criminal intent. *Ib.*

EMPLOYEE. See Principal and Agent.

ESTOPPEL.

Pleading: Petition. When a petition states such improper acts upon the part of defendant as will defer the running of the Statute of Limitations in his favor, a further plea that he is estopped to plead the statute is useless. *Sonnenfeld v. Millinery Co.*, 309.

EVIDENCE.

1. **Witness: Coindictor: Not Indorsed on Indictment.** A witness who was jointly charged by information with defendant, and whose name is not indorsed on the information, is competent to testify for the State in the separate trial of defendant, after a *nolle prosequi* has been entered as to such witness. *State v. Conway*, 271.

EVIDENCE—Continued.

2. **Burglary and Larceny: Sufficient Evidence.** Where the evidence showed that both the burglary and larceny had been committed by some one, and a gold watch and two or three hundred dollars in money taken, and there is testimony that defendant was in possession of the watch shortly after the burglary was committed, the evidence is sufficient to take the case to the jury as to both the burglary and larceny. *State v. Conway*, 271.
3. ———: **Cross-Examination of Witness: Former Penitentiary Record of Defendant: Collateral Matter: Alibi.** The defendant was charged with burglary and larceny of money and a watch, and interposed an alibi as a defense. The State had shown that a short time after the burglary defendant had gone to a saloon and exchanged ten dollars in silver for a ten-dollar bill. For the purpose of accounting for the fact that he had ten dollars in his possession, defendant called a witness who testified that defendant was usually employed and that he had been employed in another city for three or four years preceding the date of the offense. The prosecuting attorney, on cross-examination, asked the witness if he did not know that defendant was in the penitentiary during the time he had testified he was in said city. The defendant had not testified and had not introduced evidence of good character. *Held*, that it was error to permit the prosecuting attorney to cross-examine the witness as to defendant's former imprisonment. *Ib.*
4. ———: ———: ———: ———: ———: **Cured by Direction to Disregard.** On cross-examination the witness testified that he had heard persons say that defendant was in the penitentiary during the time witness had on direct examination testified he was in another city, and after defendant's motion to strike out this answer was overruled the court, of its own motion, said: "That part which he heard will be stricken out and will not be considered by the jury." *Held*, that the error in permitting the prosecuting attorney, on cross-examination, to ask the witness if defendant was not in the penitentiary during the time he had testified he was in another city, was not cured by the action of the court in striking out what the witness heard and directing the jury to disregard it. The court did not strike out the previous cross-examination relating to defendant's former imprisonment, and that was the prejudicial matter in the cross-examination. Besides even had the court stricken that out, it is doubtful whether thereby the unfavorable impression the jury had received of defendant's character and reputation would have been removed from their minds, so as to cure the error. *Ib.*
5. **Carnal Knowledge: Offer of Proof.** In this prosecution for carnal knowledge the accused complains upon appeal that the trial court erred in refusing to permit him to prove acts of unchastity of the prosecutrix prior to the commission of the alleged offense, and in confining him to proof of the prosecutrix's general reputation. *Held*, that the colloquy between court, counsel and witness, as set out in the opinion, does not show such error by the court, and besides, even if the court had ruled as complained of, the Supreme Court could not reverse the case, for the accused did not state what facts he wished to show by his witnesses. The mere statement that he proposed "to prove her unchastity by circumstantial evidence" was no such statement of facts. *State v. Kozlickie*, 301.

EVIDENCE—Continued.

6. **Burden of Proof: Limitations.** The burden of proof was upon defendant who pleaded the Statute of Limitations in an action in ejectment and to quiet title. *Slicer v. Owens*, 319.
7. **Old Recollections.** Recollections of casual remarks made by a deceased grantee as to the actual owner of the land, made from twenty-eight to forty years prior to the trial, are extremely unreliable as tending to establish a resulting trust in the grantee's wife. *Williams v. Keef*, 366.
8. **Libel: Malice: Proof.** For a newspaper to advocate a just taxation of the properties of a corporation of which plaintiff was a stockholder, is no evidence of malice toward him. *Tilles v. Publishing Co.*, 609.
9. ———: ———: **Enforcing the Law.** To publish what was being done by the officials of the county in the matter of enforcing the law in reference to bookmaking and pool-selling on the race track owned by the corporation of which plaintiff was a stockholder, is no evidence of express malice towards him, or of a manager thereof. *Ib.*

EXCEPTIONS.

1. **Appeal: Agreed Statement: Matter of Exception.** Agreed statements of facts, in cases instituted by petitions, are mere matters of evidence, and do not become a part of the record unless incorporated in a bill of exceptions. *Fruin v. O'Malley*, 250.
2. ———: **Separate Finding of Facts.** Under the statute (Sec. 1972, R. S. 1909) both the special findings of facts and conclusions of law should be entirely separate from the judgment, in order that the party excepting to such finding may except to the "decision of the court on the conclusions of law or equity arising in the case," which means that such exceptions to the court's conclusions of law shall be saved as may be properly included in a bill of exceptions. The law does not contemplate that exceptions shall be written into the record proper. *Ib.*
3. ———: **No Bill of Exceptions.** In an action at law, where there was a special finding of facts, which is not made a part of the judgment, and no bill of exceptions was filed, there is nothing for review on appeal but the record proper, and a separate finding of facts is not a part of the record proper; and if the judgment is legally sufficient within itself, and the petition legally sufficient to support the judgment, that judgment will be affirmed. But if there is an error on the face of the judgment, that error will be corrected. *Ib.*
4. **No Exception: No Request.** Although no exception was saved to an erroneous instruction given for the State, or to a failure to instruct on all the law of the case, and no other objection was made except that in the motion for a new trial it was assigned as error that the court "erred in failing to instruct on the whole law governing the case," the defendant is entitled to a reversal of the judgment of conviction of both larceny and burglary on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict," as the statute (Sec. 5231, R. S. 1909) specifically requires. The court should have given instructions providing

EXCEPTIONS—Continued.

for a separate verdict as to the distinct offenses, whether requested or not, and whether or not an exception was saved to its failure to do so, a failure to so instruct will work a reversal on appeal. *State v. Conway*, 271.

5. ———: **Non-Direction.** Non-direction, with or without exceptions saved, is error in a felony case. There is an inherent difference in this regard between civil and criminal cases, some of which are enumerated in the opinion. Besides, the statute specifically requires instructions to the jury, "Whether requested or not, upon all questions of law arising" in a criminal case "which are necessary for their information in giving their verdict;" and into that statute cannot be read the proviso that non-direction in a felony case is not error which will warrant a new trial unless it affirmatively appear that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to its failure to so instruct. *Ib.*
6. ———: ———: **In Felony Cases: Statute.** The provision in said Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case. *Ib.*
7. ———: ———: **Motion for New Trial: General Assignment: Usually Insufficient.** The motion for a new trial should call the court's attention to the specific point of law on which it is claimed the court failed to instruct; otherwise, it will ordinarily be insufficient; but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of justice, will grant a new trial, though the point be presented in it for the first time. *Ib.*
8. ———: **Instruction: Not Preserved in Bill.** The action of the court in refusing instructions on the subject of alibi, set out in the record proper but not made a part of the bill of exceptions, is not for review on appeal. *Ib.*
9. **One Exception: Two Motions.** Exceptions saved to one order overruling the motion for a new trial and the motion in arrest, preserve for review the action of the court upon both motions. *Mugan v. Wheeler*, 376.
10. **Pleading: Departure: Abandoned Petition Not Preserved.** Whether or not the amended petition was a departure from the original petition cannot be considered on appeal, unless the original petition is made a part of the record as a matter of exception. *Ib.*

EXCEPTIONS—Continued.

11. **Departure: Amended Petition: Original Abandoned: Matter of Exception.** When an amended petition is filed by leave of court, the original petition is abandoned and thereafter can be made a part of the record only as a matter of exception, and if not made a part of the record by exception only the amended petition is before the court on appeal, and the question of whether the amended petition was a departure from the original cause of action is not for consideration. *Campbell v. Boyers*, 421.
12. **Amended Petition: Motion to Strike Out: Overruled: No Exception.** If plaintiff files an amended petition and thereupon defendant files a motion to strike it out, and that motion is overruled, to which no exception is saved, and thereafter defendant appears and testifies before the referee, his answer to the original petition, which remained on file and was not withdrawn, must be considered a pleading on file and responsive to the amended petition. *Ib.*
13. **Referee's Report: Equity.** Alleged errors growing out of a reference are matters of exception and can only be reviewed when incorporated in a bill of exceptions. Besides, in an equity case a referee's report, like the verdict of a jury, is only advisory, and not binding upon the court. *Ib.*
14. **Ruling Excepted to Set Aside.** An appellant cannot be heard in the appellate court to complain of a ruling of the trial court against him which was afterwards set aside. Where the decree and ruling of the trial court upon the referee's report, to which appellant objected and filed his term bill of exceptions, was at the same term of court set aside and for naught held, appellant cannot be heard to urge his objection to that report. *Ib.*
15. **Bill of Exceptions: Lost: Substitution.** The purported bill of exceptions substituted in lieu of the original which has been lost or destroyed, should be something more than calls for the oral testimony of witnesses. It should at least contain their names, and the substance of their testimony. *Graves v. Chapman*, 650.
16. ———: ———: ———: **Copy: Legal Conclusion.** A statement by counsel that because the original bill of exceptions and the stenographer's notes were lost or destroyed he has been unable to supply a copy thereof, is simply the statement of a legal conclusion and not of the facts by which the court could determine whether such copy could be reproduced. Appellant should make an honest effort to supply a substantial copy of the lost bill or the substance of the testimony. *Ib.*
17. ———: ———: ———: **New Trial: Negligence of Counsel and Clerk.** Respondent should not be penalized by another trial, and its uncertainty, because of the negligence and carelessness of counsel for appellant, or the misconduct of the clerk in permitting counsel for other defendants to remove the bill of exceptions from his office and to retain them for years without inquiry as to their safety or whereabouts. *Ib.*
18. ———: ———: ———: **Deceased and Scattered Witnesses.** It would be unjust to grant appellant a new trial after the witnesses are scattered or dead, simply because the

EXCEPTIONS—Continued.

bill of exceptions, through no fault of respondent, has been lost or destroyed. *Graves v. Chapman*, 650.

19. ———: ———: ———: **Status Quo.** A new trial because of a loss of the original bill of exceptions should not be granted where the parties at a new trial would not be *in statu quo*, and where appellant permitted three years to elapse after the bill was lost or destroyed without making any effort to supply it. *Ib.*

FINDING OF FACTS.

Partnership: Scope of Authority. A finding by the trial judge sitting as a jury that the defaulting partner acted outside the scope of his authority, is not a finding of fact, but is only an opinion on a point of law. *College v. Dockery*, 522.

See, also, **Practice.**

FORMER DECISION. See **Res Adjudicata.**

FRAUD.

1. **Contract: Cancellation: Unwise.** If a contract made by a corporation was made in good faith and by lawful authority it cannot be set aside by the court at the suit of the minority stockholders and minority directors on a showing that it was unwise or that it gave to the other party the advantage. Corporations, like individuals, make bad bargains, but the courts will not for that reason set their contracts aside. *Trendley v. Railroad*, 73.
2. ———: ———. An express company had a contract with the Suburban Railway Company whereby the express company was granted the exclusive right to do an express business over the lines that the railway company then owned or might thereafter acquire, and that contract was at a subsequent date so modified as to relinquish the exclusive feature of the contract and to authorize the Suburban Company to make a contract with the Illinois Traction Company allowing the latter to pass its cars carrying through-express freight over certain lines of the Suburban Company. It is this modification of the original contract that is the matter in suit, and the plaintiffs, who are minority stockholders and minority directors of the express company, claim that the modification was so unfavorable to the express company as to sustain the allegation that it was the result of fraud on the part of its president and other directors entrusted with the duty of protecting the company. The Traction Company owned a large system of completed interurban electric railways coming from Springfield, Illinois, to St. Louis, and when the contract was modified was constructing a line which if completed would reach from Edwardsville to East St. Louis and carry both local and through-express freight, but it wished to cover the route by use of the Suburban tracks, without building that line. If that line were built the Traction Company would have hauled express freight, and would have been a more formidable competitor of the express company from Edwardsville to East St. Louis than it would have been if the concession to carry only through freight over the Suburban were made, which concession the modification of the contract permitted to be made, and by that

FRAUD—Continued.

modification the express company relinquished its exclusive right to carry through-express freight between Edwardsville and East St. Louis over the Suburban, but acquired the right to run express cars between those two cities, and between Alton and East St. Louis. *Held*, that these facts show that the charge of fraud against the majority directors was unfounded. *Ib.*

3. ———: ———: **Reduction of Capital by Unwise Contract.** A board of directors cannot increase or reduce the capital stock of a corporation, but that rule does not prevent the directors from modifying a contract which constitutes a large per cent of the company's assets, even though it be ninety per cent, and the modification results in great loss to the company. Nor can the board of directors, unless authorized thereto by the stockholders, put an end to the company's business and defeat the objects of its creation by selling in mass all its property and good will; but where the modification of an existing contract had no such purpose, and the evidence tends to show that if the majority of the directors had been left alone to carry on its business under the modified contract, and had not been harassed by hurtful suits brought by the minority directors and stockholders, the corporation might have entered upon a successful business career, it will not be held that the board of directors did not have authority to make the modified contract. *Ib.*
4. ———: ———: **Special Meeting: Specified in Notice.** A notice specifying that the purpose of the special meeting of the board of directors would be to authorize the president to sign and enter into a certain contract "bearing date July 16, 1906," sufficiently specifies that the purpose was to execute a contract bearing that date, which after being redrafted and dated July 18th, but not otherwise changed, was then signed—especially where all the directors were present. *Ib.*
5. **Corporation: Directors: Lawful Meeting: Trapped into Being Present.** A director cannot be trapped into a meeting of the board against his will; and though the meeting is held on the day and at the hour fixed by the by-laws, yet if his presence is necessary to make a majority and he took no part in the meeting, it was not legal. So that where the by-laws provided for a regular meeting at ten a. m. on the first Monday of each month, at the company's office, which was rarely observed, and at that hour on a certain first Monday two of the five directors called at the office where another was in charge and stated to him that they had come to hold a directors' meeting, and he left, though counted by them as present, and no notice had been given of such meeting to either him or the other directors and no meeting was expected, said meeting was not legal. *Ib.*
6. **Contract: Cancellation: Equity: Forfeiture: Pleading: Decree.** Where the petition to have cancelled a modification of a contract between an express company and a railway company, states that the contract has been forfeited by the railway company and asserting that it would be inequitable to permit it to be forfeited and praying that the forfeiture and modification be annulled and that the railway company be compelled to continue to perform the original contract, to which the railway company files a general denial, a dismissal of the bill and a

FRAUD—Continued.

refusal to cancel the modified contract completely disposes of the question of forfeiture; and it was not good pleading for defendant to justify the forfeiture in its answer by way of a cross-bill, in the equity suit, but since the dismissal of the bill disposes of the question of forfeiture, that part of the decree declaring the contracts forfeited may be ignored. *Trendley v. Railroad*, 73.

7. **Receivers: Distribution of Proceeds: No Objection to Order Until After Appeal.** Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiffs may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands, and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree. *Ib.*
8. **Settlement: No Counterclaim.** Where the counterclaim pleaded by defendant—to-wit, that liquidated damages at the rate of \$500 a day if the work was not completed within a given time were to be deducted—was not supported by any evidence that it was taken into account when the settlement was made, but all the evidence is that the defendant in the negotiations took the position that it would pay only what the engineer certified was due and no more, and his estimates of what defendant owed did not include that item, there is no such accord and satisfaction as bars a reopening of the account. The settlement was not a compromise, because defendant conceded nothing. *Scott v. Realty Co.*, 112.
9. ———: **Receipt in Full: Exception.** Part payment of a debt is not a discharge of the whole obligation, even when the creditor gives a receipt in full. But an exception to that rule is that, when there is an account between the creditor and debtor sufficiently involved to afford the basis of a fair dispute as to the amount due, and after full consideration the creditor yields to the debtor's view and agrees to accept the amount which the debtor concedes to be due and gives a receipt in full, and there is no other controlling consideration or matter, the settlement is binding, for then it comes under the head of account stated. *Ib.*
10. ———: ———: **Threatened Insolvency: Misrepresentation: Coercion.** Where the defendant conceded a certain sum to be due plaintiffs and told them they could accept that or nothing, and plaintiffs informed the defendant's president that they were going to sue for the amount they claimed to be due, and he thereupon said it would suit the company just as well to be sued, because if the company should settle then it would have to borrow the money it proposed to pay, whereas a lawsuit would last three years or longer, and in the meantime if the company was successful in disposing of its property it would have enough to pay the whole of plaintiff's claim or else it would be insolvent and plaintiffs would get nothing; and plaintiffs looked up the matter and were satisfied the prospect of insolvency as foreshadowed by the president was correct, and

FRAUD—Continued.

they then yielded to defendant's demand and settled, giving a receipt in full, but thereafter upon further investigation they ascertained that the representation as to insolvency was not true, the settlement is not such an accord and satisfaction as bars plaintiffs from recovering what is due them, for the president thereby introduced an element of coercion into his offer, and did not deal fairly with his creditor, and hence is not entitled to the advantage so obtained. *Ib.*

11. ———: ———: **Concealment.** A concealment of the available assets of a corporation by its president, in his discussion of the company's solvency and ability to pay its debt to plaintiffs, when because of his representation that it was insolvent plaintiffs were induced to give a receipt in full of their claim, is a material fact bearing on the question of the fairness of the alleged settlement, whether the concealment was intentional or not. *Ib.*
12. ———: ———: **Coercion: Misrepresentations.** Where plaintiffs sue for the balance due on account, and defendant pleads settlement, and plaintiffs reply that the settlement was coerced by defendant's representations that it was insolvent, it is no defense that such representations were true and therefore there was no fraud. Such a suit is not a case of obtaining goods under false pretense. It is the case of a debtor, professedly able then to pay what he conceded to be due, refusing to pay it, and coercing his creditor to execute a receipt in full by holding up to him the prospective insolvency of the company. If the settlement was coerced under such circumstances it was not fair, and whether it was so obtained is a question of fact for the jury. *Ib.*
13. **Accounting: Interest: Payments Voluntary: Reimbursement.** Where the entire transaction by which defendant built a house on plaintiff's lot and obtained and foreclosed a deed of trust thereon, was fraudulent and void, defendant is a mere volunteer as to the payment of repairs, insurance, taxes, water taxes and rents collected, and without standing in a court of equity to claim that he be reimbursed for the sums so paid or to interest on the sum named in the deed of trust. *Campbell v. Boyers, 421.*
14. **Partnership: Fraud by One Partner: Liability of Other.** For the act of a partner, done in the name of the firm and within the scope of the partnership business, the other member of the firm is liable; and the fact that he himself has done no wrong, is immaterial. One partner has authority to bind the firm in all transactions within the scope of the partnership business; and the misrepresentation of facts, made by one partner to a client of the firm who is held out to such client by the other as authorized to act for the firm, is binding on the firm; and if that other partner represents, within the scope of the firm's business, that the title to a piece of land is good in the fictitious owner, and thereby the client is induced to loan money thereon, which is appropriated by the defaulting partner who in the name of the firm has the transaction in hand, the firm and the other partner are liable for the money. *College v. Dockery, 522.*
15. ———: ———: ———: **Mortgage: Agreement for Abstract of Title.** An agreement that, before any notes secured by a deed of trust were sold, an abstract of all conveyances of record

FRAUD—Continued.

affecting the title to the land should be furnished to the purchaser, showing that the deed of trust securing the notes was recorded and the title approved by the purchaser or his attorney, is one made in the interest of and as a protection to the purchaser, and a failure by the purchaser to require these things, will not relieve the partner of the man who conducted the transaction and imposed a forged and fraudulent note on the purchaser, from reimbursing the loss due to the false representations. Besides, in this case, there is no substantial evidence of such an agreement. *College v. Dockery*, 522.

16. ———: ———: ———: **Sharing Commissions with Purchaser.** An honest agreement by the firm making the loan to share the commissions with the lender's treasurer, is immaterial when the firm is sued for fixing up and imposing on the lender a fictitious and fraudulent note. If it was not honest, but a part of a scheme to defraud the lender, entered into by its treasurer and the firm, then the firm was a party to it, and it is still no defense to any member of the firm. *Ib.*
17. ———: ———: ———: **Negligence of Lender.** The defrauded member of the firm making the loan has no right to complain of the negligence of the lender in not sooner discovering the fraud if he himself, having the means at hand, did not sooner discover it. The partner who has done no wrong cannot be heard to charge the lender with such negligence unless the defrauding partner could make it. *Ib.*
18. **Limitations: Discovery: Pleading.** It is not always necessary for a plaintiff, in an action for fraud and deceit, to which the defense of the Statute of Limitations is interposed, to aver that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate. And if he merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, the defendant cannot, on appeal, complain of the defect in the pleading. *Held*, by WOODSON, J., dissenting, that in order for plaintiff to avail itself of the exception to the Statute of Limitations which prevents it from running, it was necessary to plead it; and that necessity for the plea was not waived by defendant, for when evidence was offered to sustain the exception the defendant objected, and one objection is enough. *Ib.*
19. ———: ———: ———: **Defects Available on Appeal: No Demurrer.** It is only when a pleading fails to state a cause of action or a defense, or fails to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. And an objection to a petition that it does not state a cause of action, made after the answer is filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable a consideration as a general demurrer timely interposed. In such case, if by reasonable inference from the facts stated, a cause of action can be constructed, it is the duty of the court to do so. *Ib.*

FRAUD—Continued.

20. ———: **Plea: No Reply: Practice: Appeal.** A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it; but the usual course is to wait until the answer is filed pleading the statute, and then avoid it by a reply. But in such case if plaintiff should fail to file a reply to the plea and the cause goes on to trial and proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on trial, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings. *Ib.*

21. ———: **Concealment: Diligence: Partners.** The law does not require of one that he should suspect fraud; on the contrary, all transactions are presumptively honest. Where there has been concealment, or where there is a relationship of trust and confidence, or where there is nothing in the transaction at the time the fraud is perpetrated, and nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out. On the other hand, the law requires the defrauded person to be reasonably watchful of his interests, and will not relieve him from it if he has been negligent in that respect.

Where a firm had in a course of dealing running through two or three years been trusted with absolute faith by a college in the loaning of its money, and soon after it had begun making loans through the agency of the firm sent its representative to inquire into the firm's standing in the community and to view the securities, and was assured by the defendant partner that the other partner had the business of these loans in hand, and then after the confidence of the college was entirely obtained, the other partner used an impecunious person named Smith to obtain a loan on his own land and had the notes signed by Smith, and in the firm name certified that there were no mortgages or liens on the land except the deed of trust securing this loan to Smith, which had been assigned to the firm, that the title was good in Smith and the deed of trust recorded, and when the notes were received by the college it honored the firm's draft, and thereupon the defaulting partner placed the amount to the firm's credit and checked it out, and paid the interest for three years, concealing the whole transaction from defendant and the college for that length of time, the college cannot be held to be negligent of its duty in not sooner discovering the fraud, and the Statute of Limitations did not begin to run against the college when the fraud was first perpetrated, but only upon its discovery by the college.

Held, by WOODSON, J., dissenting, (1) that the loss occurred through the negligence of the college in not demanding for three or four years the deed of trust which it was agreed should be furnished to it as security for the loan; and (2) the most ordinary business prudence on the part of the college would have exposed the fraud, and when so exposed the five-year Statute of Limitations would have at once begun to run, and the suit is barred on that theory.

Held, by GRAVES, J., dissenting, that knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to the discovery of fraud; and applying this rule, the facts show that the well established rule of doing business between the college and the partnership required the firm to forward to the college, along

FRAUD—Continued.

with the notes, an abstract of title, a certificate of title of a certain firm of attorneys, and a deed of trust recorded, and a failure to forward any of these things within a reasonable time was sufficient to put the college, or any prudent person, upon inquiry, and to start the Statute of Limitations to running.

Held, by BROWN, J., dissenting, that the college might have waived the delivery of the abstract of title and the certificate of their attorneys, in view of the certificate of the firm, who were abstracters, that the title was vested in Smith; but as it had always been the custom for the college to receive a deed of trust whenever it made a loan, and none was sent in this case and no inquiry was made why it was not sent, and no investigation was made, the college was guilty of gross negligence, which was sufficient to set the statute to running. *College v. Dockery*, 522.

FRAUD AND DECEIT.

Fraud and Deceit: Appellate Practice: Simple Reversal. Where all the facts are before the court in an action of fraud and deceit, tried by the court sitting as a jury, there is no necessity for a new trial; and the judgment for defendant being wrong, it will simply be reversed, and the trial court directed to enter judgment for plaintiff. *College v. Dockery*, 522.

FRAUDULENT CONVEYANCES.

Corporations: Payment for Capital Stock. R organized a corporation, of which he owned all but two shares of the stock, paying for the stock by conveying real estate to the corporation. His wife joined with him in conveying her homestead and dower interest in the property only upon agreement by the corporation that her interest should be reconveyed to her in other property whenever the homestead property should be sold by the company. After the corporation had become insolvent it conveyed the property in suit to a trustee for R's wife. *Held*, that the conveyance to the trustee was voluntary, without consideration and a fraud on the plaintiff, a creditor of the corporation. The corporation had no power to make any agreement to return any consideration paid for its capital stock. *Davis v. Realty Co.*, 216.

GERRYMANDER. See Senatorial Districts.

GOVERNOR.

1. **Senatorial Districts: Promulgation by Governor: Directory Requirement.** The words of the Constitution declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be binding and effective as if done by the General Assembly," is mandatory, and not merely directory. This court is firmly wedded to the doctrine that constitutional requirements are mandatory rather than directory. It will not undertake to amend the Constitution by whittling it away piecemeal. *State ex rel. v. Hitchcock*, 433.
2. **Presumption that Proclamation was Made.** The language of the Constitution implies an actual proclamation by the Governor—not one by the Attorney-General and Secretary of State.

GOVERNOR—Continued.

Because the Secretary of State and Attorney-General made up a statement dividing the State into senatorial districts, signed it, and the Great Seal of the State was attached thereto and it was filed in the office of the Secretary of State, as the constitutional provision requires, it will not be presumed that proclamation thereof was made, or that the legal effect was the same as if proclamation had been actually made, in the face of the fact that the Governor did not sign the statement, did not concur in anything that was done, and has persistently refused to make public proclamation of what was done. *Ib.*

3. **Conforms to Other Legislative Requirements.** The said constitutional provision conforms to the general idea that all forms of legislation are supposed to meet with the Governor's approval. *Ib.*

HOMESTEAD.**Fraudulent Conveyance: Corporations: Payment for Capital Stock.**

R organized a corporation, of which he owned all but two shares of the stock, paying for the stock by conveying real estate to the corporation. His wife joined with him in conveying her homestead and dower interest in the property only upon agreement by the corporation that her interest should be reconveyed to her in other property whenever the homestead property should be sold by the company. After the corporation had become insolvent it conveyed the property in suit to a trustee for R's wife. *Held*, that the conveyance to the trustee was voluntary, without consideration and a fraud on the plaintiff, a creditor of the corporation. The corporation had no power to make any agreement to return any consideration paid for its capital stock. *Davis v. Realty Co.*, 256.

HUSBAND AND WIFE.

Resulting Trust: Proceeds of wife's Land: Presumption. As the law stood in 1867 the husband had a right to reduce to his possession, and to become the absolute owner of the proceeds of a sale of his wife's real estate not held by her as a separate estate; and if he used the money arising from a sale of her land to purchase other land and took the title in his own name, it will be assumed that he intended to reduce the money to his possession and did so with her consent, in the absence of a showing of any agreement between them that he took the property as her agent or trustee. *Williams v. Keef*, 366.

INCORRIGIBLES. See **Criminal Law.**

INFORMATION.

Judgment: Incurrible Girl: No Finding of Facts. A judgment that fails to show that any trial was had or that defendant was found guilty of any offense covered by the statute is insufficient. A judgment which does not find that the girl was incurrible, or that her associations were immoral or criminal, or bad or vicious, but simply finds that "she is a fit subject to be committed to the State Industrial Home for Girls," will not authorize the sheriff to deprive her of her liberty. *Ex parte See*, 292.

INSANITY.

1. **Probate Court: Jurisdiction.** Probate courts have full jurisdiction to pass upon the sanity of persons brought before them to answer informations charging unsoundness of mind. The Constitution (Sec. 34. Art. 6) expressly authorizes probate courts to appoint guardians and curators for persons of unsound mind, and the power implies the power to pass upon the sanity of the person for whom such guardian or curator is to be appointed. *Ex parte Zorn*, 267.
2. ———: ———: ———: **County.** The probate court of the county of the residence of the person alleged to be insane, and not that of the county in which he is being confined in a state hospital as a private patient, is the proper court to conduct the inquiry into the alleged insanity of such person. *Ib.*
3. ———: ———: ———: **Process to Another County.** And the probate court of the county of such person's residence has jurisdiction to send its process to the county in which such person is confined and have it served there. *Ib.*
4. ———: ———: ———: **Process: General Statute: Section 3863.** Although the statute does not expressly authorize probate courts to send their notices or writs to other counties to be served upon persons sought to be declared insane, yet as probate courts are a part of the judicial system of the State and are empowered by the Constitution to pass upon the sanity of persons, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law; and that has been done by Sec. 3863, R. S. 1909, declaring that "all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law." *Ib.*

INSOLVENCY, REPRESENTATION OF. See *Fraud*.

INSTRUCTIONS.

1. **Negligence: Reliance on Rumbling of Train to Give Notice.** An instruction telling the jury that no warning signals were necessary until the engineer discovered that the trespasser on the track, within the sound zone of a much greater train on a near-by track, did not hear the rumbling of his train, was properly refused. *Dutcher v. Railroad*, 137.
2. ———: ———: **Not Looking.** An instruction which precludes a recovery by the trespasser because she walked leisurely down the track without turning her head, and this although the jury believe "no signal was given nor effort made to stop the train," should be refused. It is not the law of a case falling within the humanitarian doctrine. *Ib.*
3. ———: ———: **Due Care: What is Stopping and Signal Distance.** An instruction declaring that an alarm signal at 600 feet from the pedestrian on the track was due care, and that the engineer was not required to stop the train when he came in stopping distance of her, was, under the circumstances of this case, properly refused. And so also was another instruction declaring as a matter of law that if the alarm signals and attempts to stop the train began 600 feet from plain-

INSTRUCTIONS—Continued.

tiff and continued until she was struck she could not recover, properly refused, for it invaded the right of the jury to determine what was due care under the peculiar circumstances of this case. *Ib.*

4. ———: ———: **Noise of Another Train: Not Looking Behind.** An instruction telling the jury that it was the imperative duty of the pedestrian on the track, because of the great noise made by a train passing in the opposite direction on a near-by track, to look behind to see if the train that struck her was approaching, and if she failed in that duty she could not recover, was properly refused. In effect, it was a mandatory instruction for defendant. *Ib.*
5. ———: ———: **Wantonness: Humanity Rule.** The court should not tell the jury in a case resting on the humanitarian rule that the railroad company owed no duty to a pedestrian walking on its track except to not willfully or wantonly injure her. The willfulness and wantonness doctrine is exploded. The touchstone of duty in the law of negligence is due care, not a shade less or more. *Ib.*
6. ———: ———: **Alarm Signals Not Heard for Noises.** An instruction based on the theory that if the alarm signals were timely given but could not be heard because of the noises made by a train on another near-by track, the pedestrian could not recover for injuries received by being run down by the train, is not the law of a case resting on the humanitarian doctrine. Due care does not, because of the noises, exclude the duty to stop the train in time to avoid the injury. *Ib.*
7. ———: ———: **Limiting Distance for Signals.** An instruction declaring the law to be that if the whistle was blown from three to six hundred feet from plaintiff as she walked on the defendant's railroad track with her back to the approaching train, and afterwards until she was struck, and the engineer did all in his power to save her after discovering she did not get off the track to avoid her own injury, then the verdict must be for defendant, under the circumstances of this case invaded the province of the jury, by limiting the distance in which the engineer was obliged to begin an effort to warn and save plaintiff to within three to six hundred feet, and therefore was properly refused. *Ib.*
8. ———: **Pleading: Noises of Another Train: Proof.** The noises of a train on another near-by track, and the fact that any experienced person observing that train going in one direction and the one which struck defendant going in the other could see that the two would pass about the place plaintiff was struck, are evidential matters, and proof of them may be made under a charge of a failure to use due care, without pleading them as specifications of negligence. *Ib.*
9. ———: **Trespasser: Instruction: No Duty Except to Sound Alarm.** An instruction which excludes any duty of the engineer to a trespasser to stop the train under any circumstances is bad; and a modification by inserting the words "in the first instance" in the clause declaring that "the defendant owed to her no duty, in the first instance except to warn her by the usual signals of the approach of the train in time for her

INSTRUCTIONS—Continued.

- to step off the track and avoid being struck," was more favorable to defendant than it was entitled to, since under the testimony the situation demanded the instantaneous application of the air brakes with the blowing of the whistle. *Dutcher v. Railroad*, 137.
- 10. **No Exception: No Request.** Although no exception was saved to an erroneous instruction given for the State, or to a failure to instruct on all the law of the case, and no other objection was made except that in the motion for a new trial it was assigned as error that the court "erred in failing to instruct on the whole law governing the case," the defendant is entitled to a reversal of the judgment of conviction of both larceny and burglary on the ground that the court failed to instruct the jury on all questions of law "necessary for their information in giving their verdict," as the statute (Sec. 5231, R. S. 1909) specifically requires. The court should have given instructions providing for a separate verdict as to the distinct offenses, whether requested or not, and whether or not an exception was saved to its failure to do so, a failure to so instruct will work a reversal on appeal. *State v. Conway*, 271.
- 11. ———: **Non-Direction.** Non-direction, with or without exceptions saved, is error in a felony case. There is an inherent difference in this regard between civil and criminal cases, some of which are enumerated in the opinion. Besides, the statute specifically requires instructions to the jury, "whether requested or not, upon all questions of law arising" in a criminal case "which are necessary for their information in giving their verdict;" and into that statute cannot be read the proviso that non-direction in a felony case is not error which will warrant a new trial unless it affirmatively appear that the court's attention was called to the question on which an instruction was desired and an exception saved at the time to its failure to so instruct. *Ib.*
- 12. ———: ———: **In Felony Cases: Statute.** The provision in said Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case. *Ib.*
- 13. ———: ———: **Motion for New Trial: General Assignment: Usually Insufficient: Exception.** The motion for a new trial should call the court's attention to the specific point of law on which it is claimed the court failed to except; otherwise, it will ordinarily be insufficient; but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of jus-

INSTRUCTIONS—Continued.

tice, will grant a new trial, though the point be presented in it for the first time. *Ib.*

14. **Carnal Knowledge: Facts in Issue.** Where, in a prosecution for carnal knowledge, there was no evidence from which the jury had any right to draw the inference that the prosecutrix had been guilty of acts of lewdness or unchastity, what evidence there was tending to show only that she was sometimes out till midnight with young men at picture shows, and that she talked with men in the bakery, where she worked, an instruction was properly refused which stated that "to establish the unchastity of the prosecuting witness . . . it is not necessary to do so by proof of direct acts of unchastity, but it may be done by any and all acts and statements made by her from which a reasonable inference of her unchastity can be drawn." This instruction would have authorized the jury to find unchastity from evidence which did not show either bad reputation or acts of lewdness or unchastity. *State v. Kozlickie*, 301.

INSURANCE.

1. **Statutes: Amendment: Substitution: Intermediate Act: Insurance Company Capital.** When a section of a statute is amended or displaced by a later substituted act, and still later an act is enacted which in terms purports to amend the original repealed section, referring to it by section number, such intermediate amendment or substitute is to be regarded as if it had always been a part of, or in place of, the original section, and such last amendment of or substitute for the original act is valid. When Sec. 7957, R. S. 1899, was amended and displaced by the Act of 1901, which reduced the capital stock, certain insurance companies must have to \$100,000, and in 1909 an act was passed which in terms purports to amend Sec. 7957, R. S. 1899, by requiring such companies to have \$200,000 capital, and which does not refer to the Act of 1901, the Act of 1909 applies to the intermediate substitute of 1901, which is to be regarded as if it had always been a part of said section 7957. The Act of 1901 was amended by the Act of 1909, and this act by the Act of 1911, and the insurance companies embraced within its provisions are required to have a capital of \$200,000. *State ex rel. v. Blake*, 100.
2. **Constitutionality of Statute: Raised by Foreign Corporation.** A foreign corporation which has never been licensed to do business in this State has no right to challenge the constitutionality of a statute which denies to it the right to be admitted to this State. A corporation organized in one State cannot as a matter of right immigrate into another, and no other State is bound to receive it within its borders, and it can enter only upon such terms as the State may see fit to impose; and until it is admitted a statute which imposes onerous conditions or even impossible conditions upon its original admission violates no right of such foreign corporation, and it is only persons whose rights are invaded that can question the constitutionality of a statute. *Ib.*
3. ———: ———: **Invoking U. S. Constitution: Equality of Citizenship.** A foreign corporation, which has never been admitted to this State, cannot invoke that part of the U. S. Constitution. 241 Sup.—51

INSURANCE—Continued.

tution which says that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," nor that clause in the Fourteenth Amendment which forbids a State to "deny to any person within its jurisdiction the equal protection of its laws." A corporation is not a citizen within the meaning of this constitutional provision, nor is an unadmitted foreign corporation a person within the jurisdiction of the State.

Held, by WOODSON, J., dissenting, that since relator has complied with all the laws of this State except the statutes it claims are unconstitutional and which deny to it a license, it has the same legal right that a domestic corporation has to question the constitutionality of that part of them that denies to it a right to a license. State ex rel. v. Blake, 100.

4. **Contract: Fiduciary Relation: Insurance Company: Agent.** A general agent for an insurance company made a contract with the company by the terms of which all funds received by the agent were trust funds, not to be used by the agent, but to be remitted to the company. *Held*, that the relation thus formed was a fiduciary one, which was not altered in practice by the fact that when the agent settled with the company under his previous contract containing the same terms, he failed to account for certain first-premium notes and the company allowed him special favors in order to pay for those notes, and that an official of the company soon after the making of the last contract directed the agent to cash all premium notes at once—and this view is strengthened by the fact that after the last contract was made the company wrote the agent a letter calling his attention to the fiduciary clause, censuring him for selling a premium note and failing to reimburse the maker when rejected, and warning him that his conduct was an unlawful conversion of another's property. *Hanna v. Insurance Co.*, 383.
5. **Principal and Agent: Authority to Sell Premium Notes.** Authority to a general insurance agent to sell premium notes is not permission to convert the proceeds to the agent's own use. *Ib.*
6. **Contract: Foreign Company: Compliance with Local Statutes.** Foreign insurance companies admitted to do business in this State can only contract within the limits prescribed by the statutes of Missouri. Under the license granted by the State they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." The statutes of this State governing the conduct of business by such foreign companies are declaratory of the public policy of the State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations, by annulling all the stipulations which offend the provisions of the statutes. *Head v. Insurance Co.*, 403.
7. **—: Place of Making: Law Governing: Conflict of Law.** Where the initial and consummate stages of the formation of a contract of insurance were begun and ended in Missouri; the application for insurance made there; the contract delivered there, and the premium there paid upon which the obligation of the contract depended, then the contract is a

INSURANCE—Continued.

Missouri contract and must be construed by the laws of this State. *Ib.*

8. ———: **Statutes Applicable to Non-Residents.** The statutes of Missouri regulating the business of insurance were intended for the benefit and protection of all persons lawfully in the State and who obtained contracts of insurance there from a company licensed to make such contracts only in accordance with the laws of this State. These statutes are available for the protection of any such persons, though not citizens of Missouri, so contracting in this State. *Ib.*
9. ———: **Subsidiary Contracts.** All subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. Therefore, where a contract of insurance was originally made in Missouri and governed by its laws, and where the present beneficiary in 1904 entered into a loan agreement whereby she borrowed from the defendant insurance company \$2270, and wherein she agreed the policy in question should be governed and controlled by the laws of the State of New York, such loan agreement does not constitute a new and valid contract which precludes the present beneficiary from any other redress under the policy than she would be entitled to if it had been settled in accordance with the laws of New York. *Ib.*
10. ———: **Tender or Payment of Part of Unquestioned Sum Due: Accord and Satisfaction.** The payment or tender, under a policy of insurance, of a sum less than the full amount of the unquestioned sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount due. *Ib.*
11. **Payment: Waiver by Beneficiary.** The return to a beneficiary of a policy of insurance upon which a loan had been made, with an indorsement upon the policy that it should be taken for a certain amount of paid up insurance, and the retention of the policy for some time by the beneficiary, does not constitute a waiver of the beneficiary's right to demand a further sum due her under the policy, when she had no knowledge of her legal rights thereunder, never accepted the sum tendered her, transacted none of the business relating to the insurance, and had done nothing, in fact, except to place the policy, when returned, among the papers of the insured. *Ib.*
12. **Forfeiture: Extended Insurance.** Under Sec. 6946, R. S. 1909, which provides for the application of a certain portion of the value of a policy to the purchase of extended insurance upon a failure to pay premiums, where a policy on which there had been a default had a sufficient value to extend it for its full amount beyond the death of the insured, and there was no waiver by the beneficiary of rights thereunder, a recovery of the full amount of the policy, less a loan made thereon, was warranted. *Ib.*

INTEREST.

Correcting Judgment on Appeal: Wrong Rate of Interest. Where the judgment in a case to foreclose a lien for special taxbills issued in payment of a street improvement in St. Louis, on its face shows that it bears interest from the date of its ren-

INTEREST—Continued.

dition at eight per cent, that judgment will, though there is no bill of exceptions, be so corrected as to make it bear six per cent interest. *Fruin v. O'Malley*, 250.

JUDGMENTS.

1. **Corrected on Appeal: Wrong Rate of Interest.** Where the judgment in a case to foreclose a lien for special taxbills issued in payment of a street improvement in St. Louis, on its face shows that it bears interest from the date of its rendition at eight per cent, that judgment will, though there is no bill of exceptions, be so corrected as to make it bear six per cent interest. *Fruin v. O'Malley*, 250.
2. **Information: Incurrigible Girl: Individuating Offense.** The statute (Sec. 1546, R. S. 1909) designating the character of girls that may be committed to the State Industrial Home does not individuate the offense, and it is therefore necessary that the information set out the facts which constitute the alleged offense. An information charging that the sixteen-year-old girl "was then and there unlawfully incurrigible to such an extent that she could not be controlled by her parents and guardians, and that her associations were immoral and criminal and bad and vicious" is not sufficient to support a judgment. *Ex parte See*, 292.
3. **New Trial: Combined Subject-Matter of Action: Severed by Order.** Two contiguous, separately described tracts of land were included in each count of the petition in this action to quiet title and for ejectment, and combined also in the finding and judgment of the trial court. Upon a general motion for a new trial, the court ordered a new trial as to one tract, but not as to the other. *Held*, that such order must be taken as opening the whole case for retrial as to both tracts. *Slicer v. Owens*, 319.
4. **Mandamus: Judgment on Pleadings: Conclusions and Facts.** In mandamus, where the case is put at issue by a motion for judgment on the pleadings, the facts well pleaded in the return, and not the conclusions of law pleaded in the petition or return, are the determinative matters for consideration. *Gasconade County v. Gordon*, 569.
5. **Motions: Appeals: Attorneys: Right to Practice.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom. *State ex rel v. McElhinney*, 592.
6. **Majority Opinion.** When the Supreme Court by a majority of its judges has spoken, its decision is the judgment of the court. *Tilles v. Publishing Co.*, 609.

JUDICIAL ACTION.

Partnership: Scope of Authority: Finding of Fact. A finding by the trial judge sitting as a jury that the defaulting partner acted outside the scope of his authority, is not a finding of fact, but is only an opinion on a point of law. *College v. Dockery*, 522.

JURIES AND JURORS.

1. **Practice: Exceptions: Jury: Omission to Swear a Member: Appeal.** The omission to swear a member of the jury in a civil case is but a matter of exception. *Ross v. Grand Pants Co.*, 296.
2. ———: ———: ———: ———: ———: **Constitutional Question.** There is a conflict in testimony as to whether a member of the jury in a civil case was sworn. Counsel for appellant was present during all the time in point, and yet saved no exception. He now attempts to raise a constitutional question under the provision regarding trial by jury. *Held*, that even if a constitutional question is involved (a matter not discussed), yet, since timely exception was not saved, the Supreme Court cannot decide the point. A constitutional question in order to confer jurisdiction in a given case must not only be raised below, but must be raised at the proper time and kept alive. *Ib.*

JURISDICTION.

1. **Insanity: Probate Court.** Probate courts have full jurisdiction to pass upon the sanity of persons brought before them to answer informations charging unsoundness of mind. The Constitution (Sec. 34, Art. 6) expressly authorizes probate courts to appoint guardians and curators for persons of unsound mind, and that power implies the power to pass upon the sanity of the person for whom such guardian or curator is to be appointed. *Ex parte Zorn*, 267.
2. ———: ———: **County.** The probate court of the county of the residence of the person alleged to be insane, and not that of the county in which he is being confined in a state hospital as a private patient, is the proper court to conduct the inquiry into the alleged insanity of such person. *Ib.*
3. ———: ———: ———: **Process to Another County.** And the probate court of the county of such person's residence has jurisdiction to send its process to the county in which such person is confined and have it served there. *Ib.*
4. ———: ———: **Process: General Statute: Section 3863.** Although the statute does not expressly authorize probate courts to send their notices or writs to other counties to be served upon persons sought to be declared insane, yet as probate courts are a part of the judicial system of the State and are empowered by the Constitution to pass upon the sanity of persons, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law; and that has been done by Sec. 3863, R. S. 1909, declaring that "all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law." *Ib.*

JURISDICTION—Continued.

5. **Senatorial Districts: Division of State Into: Legislative in Character: State Officers Legislative Body.** The districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts. *State ex rel. v. Hitchcock*, 433.
6. ———: ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *Ib.*
7. ———: ———: **By State Officers Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by those officers. *Ib.*
8. ———: ———: ———: **Dividing City into Districts: Circuit Court Compelled by Mandamus.** *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*

JURISDICTION—Continued.

9. ———: ———: ———: ———: ———: ———: **Both Agreeing to Court's Jurisdiction.** Held, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause. *Ib.*
10. ———: ———: ———: ———: ———: **Obiter Dictum.** Held, by GRAVES, J., that the constitutional power vested in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; and; as the majority opinion specifically holds that the Supreme Court is, on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum* pure and simple, and binding on no one. *Ib.*
11. **Libel: Place Where Cause Accrues.** The right of a plaintiff, who resides in St. Louis, to bring a suit for libel in St. Louis county against a corporation whose domicile is also in that city, was determined by the case of *Julian v. Kansas City Star*, 209 Mo. 35; and the decision in that case, to the effect that defendant by asking for a change of venue waived the question of jurisdiction, is held to settle the question. *Tilles v. Publishing Co.*, 609.
12. **Probate Court: Term: Alteration of Time.** Under the Laws of 1877, page 230, section 7, and the Revised Statutes of 1855, page 1601, section 9, the probate court of St. Louis county, at the June term, 1877, and on July 28th of that year, had express authority to make and enter of record an order changing the time for holding its stated terms, and to fix upon the second Monday in September and the first Mondays of December, March and June as the times for the beginning of the regular terms of the court. *Brown v. Marshall*, 707.
13. ———: ———: ———: ———: **Before Act of 1877 Went into Effect.** Even if the order changing the times for the beginning of the terms of the probate court of St. Louis county, made on July 28, 1877, was made one day prior to the time the Act of 1877 went into effect, the Act of 1855 (R. S. 1855, p. 1601; sec. 9) was then in force, in almost the same words, and was ample authority for the order, since the Act of 1877 did not purport to repeal any of the Act of 1855 except "all acts and parts of acts inconsistent with this act," and there is nothing inconsistent between the two, and besides the Act of 1877 was but a continuation of the Act of 1855. *Ib.*
14. ———: ———: ———: ———: **Statutory Construction: Continuation of Existing Act.** A subsequent act repealing and re-enacting at the same time a pre-existing act is but a continuation of the latter, and the law dates from the passage of the first act and not from the date of the latter. *Ib.*

JURISDICTION—Continued.

15. ———: ———: ———: **By Probate Court of County of Terms of City Court: Separation.** The separation of the city of St. Louis from the county of St. Louis in 1876 did not affect the origination, jurisdiction or location of the probate court of St. Louis county then existing. The probate court of St. Louis county had authority at its July term, 1877, to change the time for beginning the regular terms of the probate court of St. Louis city. That was not an attempt by one court to make an order changing the terms of another court. Prior to the division of the county into the city and county of St. Louis, the county seat, courts, offices and public buildings of the county of St. Louis were in the city of St. Louis, and those courts continued and remained in the city after the segregation of the present county; and the change from the probate court of the county of St. Louis to the probate court of the city of St. Louis was a change only in name, with the single exception that, after the Act of April, 1877, creating a probate court for the segregated county of St. Louis, the territorial jurisdiction of the city court was *pro tanto* curtailed. In all other respects it continued with the same officers, the same habitat and the same jurisdiction. *Ib.*

LANDS AND LAND TITLES.

1. **Resulting Trust: Long-Settled Titles.** It is not the policy of the law to allow long-settled titles to be easily disturbed. The evidence should be strong enough to remove all doubt that the husband, who used the proceeds of the sale of his wife's land to buy other land and took the title in his own name, in whom it was permitted to remain for thirteen years prior to his death and twenty-seven years thereafter, did not intend to reduce said proceeds to his own use, but in taking the title in his own name was acting as her agent or trustee. *Williams v. Keef*, 366.
2. ———: **Evidence: Proximity of Sale and Reinvestment.** The fact that the husband and wife sold her land, and two days later he bought another tract and took the title in his own name, does not afford a basis for an inference strong enough to overcome the presumption that he intended to convert the money to his own use and that she assented thereto. *Ib.*
3. **Trust Estate: Absolute Deed: Pleading: Proof.** A petition alleging that the owner of land conveyed it in trust, to be held by the grantee for the grantor, and that thereafter, at the grantor's request, the said grantee conveyed it in trust to defendant to be held by her for the use of said grantor and his heirs, states a cause of action, without an allegation that such trust was evidenced by some writing. That it was not created by a writing is a matter of defense, or is to be raised by objection to the evidence offered to prove the trust. *Mugan v. Wheeler*, 376.
4. ———: ———: **Parol Proof.** Deeds absolute and unconditional on their faces cannot be shown by oral evidence to be conveyances in trust. The statute requires an express trust to be evidenced by some writing—which may be either the conveyance itself, or a separate writing. *Ib.*
5. **Easement: Implied: Necessity: Conveyance.** An implied easement must rest upon a reasonable necessity. If there is

JURISDICTION—Continued.

another reasonable way of entrance over the grantee's own land on to the lot conveyed to him, an easement by implication will not be impressed upon the property adjoining, simply because that easement was there when both lots were owned by a common grantor and had been used by his tenants for a long number of years as a means of entrance upon the lot. So long as the element of necessity or reasonable necessity is lacking, the rule relating to dominant and servient estates does not apply. Unless the easement is necessary to the beneficial enjoyment of the property conveyed it will not be implied from a conveyance of the lot benefited by the existing easement by a deed which does not mention the easement. *Bussmeyer v. Jablonsky*, 681.

6. ———: ———: ———: **Deed: Appurtenance.** Deeds are to be construed as meaning what the language in them imports. The deed describing lots by number, or by metes and bounds, cannot be held to include as an appurtenance an easement upon an adjoining lot, conveyed by the same common grantor, unless the easement is necessary to the enjoyment of the lot in favor of which it is claimed—a necessity that must be implied from the arrangement, nature and the long continued uses to which the segregated lots have been put and are from their nature to be put. It can never be implied from considerations of convenience. *Ib.*

7. ———: ———: ———: **Passage Way Between Houses.** There had been a hall or passage way between lots 7 and 8, which extended from the western line of lot 7 four feet to the building on lot 8, and was used as a means of entrance upon the rear of both lots, and had been so used for many years by the tenants of the common grantor, when he conveyed lots 8, 9, 10, 11 and 12 to plaintiff, and lots 5, 6 and 7 to defendant, describing them by number and by metes and bounds, and omitting all reference to the passageway. There was a street in front of the lots and an alley at the rear, and in the west side of the building on lot 8 there were three doors opening upon lot 9, and plaintiff testified that he could use lot 9 and those doors as a means of entrance upon the rear of lot 8 "only" because lot 9 was his "own ground." *Held*, that the passageway was not a strict necessity, or a reasonable necessity to a proper use of lot 8, but a matter of convenience, and being wholly on lot 7 conveyed to defendant, no easement can be implied. *Ib.*

8. **Administrator's Sale: Of Real Estate to Pay Debts: Disapproved: Renewal of Order at Subsequent Term.** Where a valid order to sell the real estate to pay decedent's debts has, after proper statutory notice to the heirs and parties interested has been given, been made, and the sale made in pursuance thereof has been disapproved because of the inadequacy of the price obtained, it is not necessary to the validity of a renewal order to sell that such renewal order be made at the same term, or that the heirs and interested parties be given further notice before the renewal order is made at a subsequent term. Whenever a party is duly summoned into court for a particular purpose he remains there until that purpose is finally accomplished or disposed of, or until he is otherwise discharged according to law. *Brown v. Marshall*, 707.

LAW OF CASE. See *Stare Decisis*.

LEGISLATIVE ACTION.

1. **Senatorial Districts: Division of State Into: Legislative in Character: State Officers Legislative Body.** The districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts. *State ex rel. v. Hitchcock*, 433.
2. ———: ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *Ib.*
3. ———: ———: **By State Officers: Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into Senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by those officers. *Ib.*
4. ———: ———: ———: **Dividing City Into Districts: Circuit Court Compelled by Mandamus: Jurisdiction.** *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*

LEGISLATIVE ACTION—Continued.

5. _____: _____: _____: _____: _____: _____: Both Agree-
ing to Court's Jurisdiction. *Held*, by VALLIANT, C. J., that
courts do not render judgments that will depend for satisfaction
on the pleasure or complaisance of the parties against whom
the judgment is rendered. Though all parties express a will-
ingness to bow to the opinion rendered by the court, it cannot
render judgment if it has no jurisdiction of the cause. *Ib*.
6. _____: _____: _____: _____: _____: *Obiter Dictum*.
Held, by GRAVES, J., that the constitutional power vested in
the circuit court of the city of St. Louis to divide the city into
as many senatorial districts as there have been apportioned
senators to the city by the General Assembly, or by the three
State officers, is purely a legislative function, and the Supreme
Court cannot compel the judges of that court to perform that
duty, and has nothing to do with their reasons for refusing to
perform it; *and*, as the majority opinion specifically holds that
the Supreme Court is, on that account, without jurisdiction to
compel the circuit judges to act, all of the majority opinion that
discusses the validity of the apportionment as made by the three
State officers, is *obiter dictum*, pure and simple, and binding
on no one. *Ib*.

LEX LOCI CONTRACTUS.

1. **Place of Making: Law Governing: Conflict of Laws.** Where
the initial and consummate stages of the formation of a con-
tract of insurance were begun and ended in Missouri; the ap-
plication for insurance made there; the contract delivered there,
and the premium there paid upon which the obligation of the
contract depended, then the contract is a Missouri contract and
must be construed by the laws of this State. *Head v. Insur-
ance Co.*, 403.
2. **Statutes Applicable to Non-Residents.** The statutes of Mis-
souri regulating the business of insurance were intended for
the benefit and protection of all persons lawfully in the State
and who obtained contracts of insurance there from a com-
pany licensed to make such contracts only in accordance with
the laws of this State. These statutes are available for the
protection of any such persons, though not citizens of Missouri,
so contracting in this State. *Ib*.
3. **Subsidiary Contracts.** All subsidiary contracts made by the
parties to an insurance contract are within the contemplation
and purview of the original contract, and are not to be treated
as independent agreements. Therefore, where a contract of
insurance was originally made in Missouri and governed by
its laws, and where the present beneficiary in 1904 entered into
a loan agreement whereby she borrowed from the defendant
insurance company \$2270, and wherein she agreed that the
policy in question should be governed and controlled by the laws
of the state of New York, such loan agreement does not consti-
tute a new and valid contract which precludes the present bene-
ficiary from any other redress under the policy than she would
be entitled to if it had been settled in accordance with the laws
of New York. *Ib*.

LIBEL.

1. Demurrer: Waived by Thereafter Offering Evidence. Defendant's demurrer asked at the close of plaintiff's evidence is waived by offering evidence in support of its answer at the close of plaintiff's case and after its demurrer has been overruled. If at the close of all the evidence such demurrer is renewed, it will be considered on appeal, but will be viewed in the light of all the evidence in the case. *Cook v. Pulitzer Pub. Co.*, 326.
2. ———: Practice Commended. In libel and slander cases the practice is recognized and commended of challenging the sufficiency of plaintiff's case, as to the law and the evidence, by an instruction in the nature of a demurrer. *Ib.*
3. Demurrer: No Express Imputation of Crime: Per Se Libelous. The absence from the publication of an imputation of crime does not necessarily render the publication non-libelous *per se*. If it does impute crime it is libelous *per se*, and an instruction in the nature of a demurrer, so far as it challenges the sufficiency of the petition, is correctly refused. *Ib.*
4. Pleading: Crime: Necessity for Innuendo. If a publication directly imputes crime it is libelous *per se*, and in such case it is not necessary, in the statement of a cause of action, to plead any extrinsic facts as inducement or to add an innuendo as to its defamatory meaning. On the other hand, if the publication is libelous *per se* as imputing crime, but extrinsic facts are necessary to bring out the defamatory meaning, then the law requires the allegation of such facts as inducement, in order that the actionable character of the words may appear. *Ib.*
5. ———: ———: No Imputation of Official Misconduct: Not Alleged to be Wilful or Malicious: Sufficiency of Petition in this Case. The plaintiff was Secretary of State, and as such officer had authority to examine banks and prevent insolvent banks from continuing in business. The Salmon Bank failed on June 20, 1905, after plaintiff had gone out of office in January, 1905, after a term of four years, and the petition charges that: "On June 28, 1905, in the edition of said newspaper bearing said date, in the editorial columns thereof, the defendant corporation (having reference to said Salmon Bank and plaintiff's connection therewith) did wrongfully, wickedly and with malice publish of and concerning plaintiff the following false, libelous and defamatory words and matter, to-wit: 'Is it a Political Junkshop? The special correspondent of the Post-Dispatch states upon authority of those having examined the Salmon Bank, that the bank has been insolvent since November, 1903. Why was not the bank closed at that time? Why was it permitted to keep its doors open and receive the deposits of a confiding public? Major Harvey Salmon [meaning one of the owners and proprietors of said Salmon Bank] was a member of the Democratic Central Committee, and the intimate political friend of the machine leaders of the Democratic party [meaning the political party with which plaintiff was allied and to which he owed his nomination and election to said office of Secretary of State]. The bank's books were examined just before Ex-Secretary of State Cook [meaning plaintiff] went out of office, but no action was taken and the

LIBEL—Continued.

bank was left open to take the money of unsuspecting depositors. Is the damaging derelict a part of the political junk of the old Democratic State Machine [insinuating and meaning thereby that the plaintiff herein while Secretary of State and while administering the duties of said office was guilty of wilful and malicious partiality, neglect and misconduct in his official capacity and of favoritism and violation of official duty, and was actuated by personal, political and other improper motives in the matter of the examination and supervision of said Salmon Bank, whereby said bank was permitted to carry on its business after it had become insolvent, and that in consequence thereof its depositors were misled and deceived and suffered financial loss and injury]. That defendant corporation in the manner and by the means aforesaid did falsely, maliciously and wickedly print, publish, circulate and give currency to the charge that plaintiff while administering the office of Secretary of State (said office being one of public trust as hereinbefore stated) was guilty of partiality, favoritism, official misconduct, violation of official duty, and was actuated by improper motives in relation to the examination and supervision of said Salmon Bank, as hereinbefore more fully stated." The statute provides that "every person exercising or holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under cover of his office, shall, on conviction, be deemed guilty of a misdemeanor." *Held*, that the publication did not impute to plaintiff the commission of a crime, and the case should not have been submitted to the jury upon that hypothesis. The closing allegations of the petition, even if regarded as matters of inducement, do not allege generally that crime was imputed, nor that the partiality, favoritism or official conduct, as set forth, was wilful or malicious, and in the absence of such words of intent the misconduct alleged cannot be construed as imputing crime within the meaning of the law. *Ib*.

6. ———: Sufficient, Nevertheless: Official Misconduct. But while the said publication does not charge or impute crime to plaintiff, nor that he was actuated by corrupt motives, it does impute such official misconduct to him as brings it within the statutory definition of libel, and if the facts were false a good cause of action is stated in the petition. *Ib*.
7. ———: Inducement: Place in Petition. Matter of inducement should precede the libel and innuendo in the petition. The usual order of pleading is to set it out as prefatory allegations. *Ib*.
8. ———: Innuendo: Stating Defamatory Meaning In: Inducement Necessary. Where the defamatory meaning does not appear on the face of the article complained of, but depends upon extrinsic facts, it is not sufficient that such defamatory meaning be alleged in the innuendo only. The want of proper inducement cannot be supplied by innuendo. Words not themselves actionable, cannot be rendered so by innuendo, without a prefatory averment of extrinsic facts, which makes them libelous. *Ib*.
9. Demurrer: Pleading Sufficient: Facts Insufficient: Comment: Privilege. The publication in this case, charges

LIBEL—Continued.

that plaintiff, as Secretary of State, having in charge the examination and supervision of banks, was neglectful of official duty and protected an insolvent bank out of political and personal friendship for one of its proprietors, and the petition sufficiently states a cause of action for libel as libel is defined in the statute; but the evidence is reviewed, and the facts stated in the publication being admitted to be true, the comment thereon was not libelous, and the demurrer to the evidence offered at the close of the case should have been sustained. *Cook v. Pulitzer Pub. Co.*, 326.

10. **Comment: Political Junk.** The facts stated in the publication being true it was the right of the newspaper, as of all others, to discuss the failure of the bank whose examination and supervision was imposed by law upon plaintiff as Secretary of State, and to discuss plaintiff as Secretary of State, and to discuss plaintiff's connection therewith; and the right of comment implied the right to discuss the facts and to place thereon the writer's own construction and to express his opinion of the motives which actuated plaintiff in his failure to examine and close the bank and protect the public, regardless of whether the opinion was right or wrong, provided it was based upon facts and was not malicious. And the facts stated, that plaintiff did not examine the bank, that it was insolvent and had been for a long time and that one of its proprietors was his political and personal friend, being established, it was not actionable comment to add, "Is the damaging derelict a part of the political junk of the old Democratic State Machine?" for this inquiry amounted only to: Was this insolvent bank allowed to remain open and take the money of the unsuspecting public because of the political friendship of the Secretary of State for its owners? and that natural inquiry or comment was suggested by the facts established. *Ib.*
11. ———: **Privilege: Justification: Question for Court.** On rehearing it is *held* that the contention that if the publication is libelous on its face, the law presumes malice and falsity, and, the publication being admitted, the evidence could at most raise an issue of fact for the jury, and not a question of law for the court, is sound as to the defense of justification, but unsound as to the defense of privilege. Where the defense of privileged comment is interposed, plaintiff cannot rely on the presumption of malice, for the privilege is not removed except by proof that the facts were untrue or by proof of actual malice. Whereas, when justification is the defense, defendant must assume the burden of proving the truth of the facts stated in the publication. *Ib.*
12. **Comment: Privilege: Overcome by Proof of Falsity or Malice.** The burden is not on the plaintiff, in order to make out a prima facie case of libel, to prove that the facts stated in the publication were false, or that defendant was actuated by express malice in the comments he made thereon. The true rule is that, when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded, either by proof that the publisher was inspired by actual malice, or that the facts published and commented upon were false; if he fail to prove the one or the other, a prima facie case will not be made out, and the court should sustain a demurrer to the evidence. *Ib.*

LIBEL—Continued.

13. **Jurisdiction: Place Where Cause Accrues.** The right of a plaintiff, who resides in St. Louis, to bring a suit for libel in St. Louis county against a corporation whose domicile is also in that city, was determined by the case of *Julian v. Kansas City Star*, 209 Mo. 35; and the decision in that case, to the effect that defendant by asking for a change of venue waived the question of jurisdiction, is held to settle the question. *Tilles v. Publishing Co.*, 609.
14. **Pleading: Colloquium: Connecting Plaintiff with Publication.** If the publication is libelous *per se*, there need be, under the statute, no colloquium of extraneous facts for the purpose of showing the application of the defamatory matter to the plaintiff more than that the words were spoken or published of or concerning him. That allegation having been made, the petition need not allege that the plaintiff was either owner, lessee, operator or managing officer of the corporation conducting, permitting and encouraging the bookmaking and pool selling charged to be a felony. And to charge that "these men are engaged in the commission of a felony and the owners of the race track are equally guilty with the bookmakers under the statute," is to charge a libel *per se*. *Ib.*
15. **Owners of Corporation: Reference to Plaintiff.** The defendant on June 22nd published in its newspaper an interview with the Attorney-General in which these words were used: "These men are engaged in the commission of a felony, and the owners of the race track are equally guilty with the bookmakers under the statute"—bookmaking being then a felony. The plaintiff had then been in Europe since May 1st. The race track was owned by a corporation, in which plaintiff was a stockholder; and the property itself by two other corporations, in one of which he was a stockholder. During the year he was not in active management of either corporation, but he and two others were recognized as owners, and defendant so recognized them. Before his departure for Europe he and the other two discussed the future running of the race track, and he says the matter was left to them to do as they pleased, and he gave instructions before leaving to sue defendant if he was libeled by it and the suit was brought before he saw the publication. Held, that the proof shows that the publication refers to plaintiff and the readers thereof so understood it, as three of them who had inside knowledge of the owners testified they so understood it. *Ib.*
16. **Official Investigation of Notorious Crime: Privileged Occasion.** The official investigation by the Governor and Attorney-General of the persistent effort of a race track association to continue bookmaking and poolselling, which have been made a felony by recent statute, and at which 5000 people daily congregated, rises to the dignity of privileged occasion, or at least a quasi-privileged occasion; and where there is threatened legal action by them, the public is entitled to know the reason therefor. A fair publication, made as a matter of news or public concern and without actual malice, of what the Attorney-General says officially and for the public, under such circumstances—for instance, "These men are engaged in the commission of a felony and the owners of the race track are equally guilty with the bookmakers under the statute"—is privileged, and not actionable. *Ib.*

LIBEL—Continued.

17. **Qualified Privilege: Question for Jury.** If the publication was qualifiedly privileged and the record rebuts the idea of malice, there is no case for the jury. And though the words attributed to the Attorney-General are of themselves libelous *per se*, and though malice is presumed where the words are *per se* actionable, yet if the publication truthfully published the words used by him, who uttered them in his official capacity as information to the public, concerning a matter of great public concern, there is no question for the jury, in the absence of any showing of actual malice; and if there was no showing of express malice and none was found by the jury, although they returned a verdict for compensatory but none for punitive damages, the judgment must be reversed. *Held*, by WOODSON, J., dissenting, that the court cannot declare the interview of the Attorney-General was in fact his official opinion; that whether or not it was an official opinion was a fact to be determined by the jury, upon the evidence introduced, and not by him; and that, until that fact was established, the opinion, which was oral, was not admissible in evidence. *Tilles v. Publishing Co.*, 609.
18. ———: **Malice: Proof.** For a newspaper to advocate a just taxation of the properties of a corporation of which plaintiff was a stockholder, is no evidence of malice toward him. *Ib.*
19. ———: ———: **Enforcing the Law.** To publish what was being done by the officials of the county in the matter of enforcing the law in reference to bookmaking and pool-selling on the race track owned by the corporation of which plaintiff was a stockholder, is no evidence of express malice towards him, or of a manager thereof. *Ib.*

LICENSE TO PRACTICE LAW. See Attorneys.

LIMITATIONS.

1. **Pleading: Petition: Estoppel.** When a petition states such improper acts upon the part of defendant as will defer the running of the Statute of Limitations in his favor, a further plea that he is estopped to plead the statute is useless. *Sonnenfeld v. Millinery Co.*, 309.
2. **Deferred: "Improper Act:"** Sec. 1905, R. S. 1909. The plaintiff's petition alleges, that the defendant corporation wrongfully got possession of its note payable to plaintiff and refused to allow plaintiff to see it; that the president of the corporation was plaintiff's brother, who convinced plaintiff that the note was signed by him instead of by his corporation; that plaintiff, thus deluded, sued her brother upon the note in 1902, in good time; and, finally, that while defendant corporation knew of the pendency of plaintiff's suit against her brother as maker of the note, it used all means to prevent her from learning the truth about the note until after the Statute of Limitations had run. *Held*, that the petition stated such improper acts on the part of defendant corporation as would defer the running of the Statute of Limitations in accordance with Sec. 1905, R. S. 1909. *Ib.*
3. **Burden of Proof.** The burden of proof was upon defendant who pleaded the Statute of Limitations in an action in ejectment and to quiet title. *Slicer v. Owens*, 319.

LIMITATIONS—Continued.

4. **Suit to Quiet Title: Defense of Limitations: Action at Law: Appeal: Statement.** An action under Sec. 2535, R. S. 1909, to quiet title, and for ejectment, to which is pleaded the defense of limitations, is an action at law, and the Supreme Court will not usurp the duty of the trial court, sitting as a jury, to weigh the evidence. The appellate court's statement of the case means simply that there was some evidence of the facts stated. *Ib.*
5. ———: **Disability.** Possession acquired during the minority of the plaintiffs, who were still minors at the time of action brought, cannot afford defendant a basis for the plea of the Statute of Limitations. *Ib.*
6. ———: **Color of Title: Defective Deed.** A deed which describes none of the land to which defendant seeks to prove title by limitations, can afford no color of title beyond the bounds of defendant's actual possession. *Ib.*
7. ———: ———: **Corrected Deed.** A deed given in correction of one which did not describe any of the land in suit, will not constructively extend the grantee's prior possession to parts of the land over which he exercised no dominion. *Ib.*
8. ———: **Granting New Trial: Appeal.** Where the trial court, after deciding the many things in issue upon evidence which left many of them uncertain, and after giving judgment, sets aside its findings and grants a new trial, the order granting a new trial must be affirmed. *Ib.*
9. **Fraud: Discovery: Pleading.** It is not always necessary for a plaintiff, in an action for fraud and deceit, to which the defense of the Statute of Limitations is interposed, to aver that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate. And if he merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, the defendant cannot, on appeal, complain of the defect in the pleading.
Held, by WOODSON, J., dissenting, that in order for plaintiff to avail itself of the exception to the Statute of Limitations which prevents it from running, it was necessary to plead it; and that necessity for the plea was not waived by defendant, for when evidence was offered to sustain the exception the defendant objected, and one objection is enough. *College v. Dockery*, 522.
10. ———: ———: ———: **Defects Available on Appeal: No Demurrer.** It is only when a pleading fails to state a cause of action or a defense, or facts to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. And an objection to a petition that it does not state a cause of action, made after the answer is filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable a consideration as a general demurrer timely interposed. In such case, if by reasonable inference from the facts stated, a cause of action can be construed, it is the duty of the court to do so. *Ib.*

LIMITATIONS—Continued.

11. ———: **Plea: No Reply: Practice: Appeal.** A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it, but the usual course is to wait until the answer is filed pleading the statute, and then avoid it by a reply. But in such case if plaintiff should fail to file a reply to the plea and the cause goes on to trial and proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on trial, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings. *College v. Dockery*, 522.

12. ———: **Concealment: Diligence: Partners.** The law does not require of one that he should suspect fraud; on the contrary, all transactions are presumably honest. Where there has been concealment, or where there is a relationship of trust and confidence, or where there is nothing in the transaction at the time the fraud is perpetrated, and nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out. On the other hand, the law requires the defrauded person to be reasonably watchful of his interests, and will not relieve him from it if he has been negligent in that respect.

Where a firm had in a course of dealing running through two or three years been trusted with absolute faith by a college in the loaning of its money, and soon after it had begun making loans through the agency of the firm sent its representative to inquire into the firm's standing in the community and to view the securities, and was assured by the defendant partner that the other partner had the business of these loans in hand, and then after the confidence of the college was entirely obtained, the other partner used an impecunious person named Smith to obtain a loan on his own land and had the notes signed by Smith, and in the firm name certified that there were no mortgages or liens on the land except the deed of trust securing this loan to Smith, which had been assigned to the firm, that the title was good in Smith and the deed of trust recorded, and when the notes were received by the college it honored the firm's draft, and thereupon the defaulting partner placed the amount to the firm's credit and checked it out, and paid the interest for three years, concealing the whole transaction from defendant and the college for that length of time, the college cannot be held to be negligent of its duty in not sooner discovering the fraud, and the Statute of Limitations did not begin to run against the college when the fraud was first perpetrated, but only upon its discovery by the college.

Held, by WOODSON, J., dissenting, (1) that the loss occurred through the negligence of the college in not demanding for three or four years the deed of trust which it was agreed should be furnished to it as security for the loan; and (2) the most ordinary business prudence on the part of the college would have exposed the fraud, and when so exposed the five-year Statute of Limitations would have at once begun to run, and the suit is barred on that theory.

Held, by GRAVES, J., dissenting, that knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to the discovery of fraud; and applying this rule, the facts show that the well established rule of doing business between the college and the partnership required the firm to forward to the college, along

LIMITATIONS—Continued.

with the notes, an abstract of title, a certificate of title of a certain firm of attorneys, and a deed of trust recorded, and a failure to forward any of these things within a reasonable time was sufficient to put the college, or any prudent person, upon inquiry, and to start the Statute of Limitations to running.

Held, by BROWN, J., dissenting, that the college might have waived the delivery of the abstract of title and the certificate of their attorneys, in view of the certificate of the firm, who were abstracters, that the title was vested in Smith; but as it had always been the custom for the college to receive a deed of trust whenever it made a loan, and none was sent in this case and no inquiry was made why it was not sent, and no investigation was made, the college was guilty of gross negligence, which was sufficient to set the statute to running. *Ib.*

LOANS. See Partnership.

MALICIOUS PROSECUTION.

1. **Duty of Court and Jury.** When the facts in an action for malicious prosecution are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions. *Hanna v. Insurance Co.*, 383.
2. **Reasonable Doubt: Evidence.** In no case can an action for malicious prosecution be sustained where there was probable cause. *Held*, that in this case there was probable cause. *Ib.*

MANDAMUS.

1. **Senatorial Districts: Division of State into: Legislative in Character: State Officers Legislative Body.** The districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts. *State ex rel. v. Hitchcock*, 433.
2. ———: ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *Ib.*
3. ———: ———: **By State Officers: Coerced by Mandamus.** *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into sena

MANDAMUS—Continued.

torial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by these officers. *State ex rel. v. Hitchcock*, 433.

4. ———: ———: ———: ———: ———: Dividing City Into Districts: Circuit Court Compelled by Mandamus: Jurisdiction. *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*
5. ———: ———: ———: ———: ———: ———: Both Agreeing to Court's Jurisdiction. *Held*, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause. *Ib.*
6. ———: ———: ———: ———: ———: ———: Obiter Dictum. *Held*, by GRAVES, J., that the constitutional power vested in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; *and*, as the majority opinion specifically holds that the Supreme Court is, on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum*, pure and simple, and binding on no one. *Ib.*
7. Judgment on Pleadings: Conclusions and Facts. In mandamus, where the case is put at issue by a motion for judg-

MANDAMUS—Continued.

ment on the pleadings, the facts well pleaded in the return, and not the conclusions of law pleaded in the petition or return, are the determinative matters for consideration. *Gasconade County v. Gordon*, 569.

8. **Attorneys: Right to Practice: Probate Judge: Motion to Practice.** But where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof. *State ex rel. v. McElhinney*, 592.

MINORS.

Limitations: Disability. Possession acquired during the minority of the plaintiffs, who were still minors at the time of action brought, cannot afford defendant a basis for the plea of the Statute of Limitations. *Slicer v. Owens*, 319.

MORTGAGES AND DEEDS OF TRUST.

1. **Accounting: Fraud: Interest: Payments Voluntary: Reimbursement.** Where the entire transaction by which defendant built a house on plaintiff's lot and obtained and foreclosed a deed of trust thereon, was fraudulent and void, defendant is a mere volunteer as to the payment of repairs, insurance, taxes, water taxes and rents collected, and without standing in a court of equity to claim that he be reimbursed for the sums so paid or to interest on the sum named in the deed of trust. *Campbell v. Boyers*, 421.
2. **Partnership: Fraud by One Partner: Liability of Other.** For the act of a partner, done in the name of the firm and within the scope of the partnership business, the other member of the firm is liable; and the fact that he himself has done no wrong, is immaterial. One partner has authority to bind the firm in all transactions within the scope of the partnership business; and the misrepresentation of facts, made by one partner to a client of the firm who is held out to such client by the other as authorized to act for the firm, is binding on the firm; and if that other partner represents, within the scope of the firm's business, that the title to a piece of land is good in the fictitious owner, and thereby the client is induced to loan money thereon, which is appropriated by the defaulting partner who in the name of the firm has the transaction in hand, the firm and the other partner are liable for the money. *College v. Dockery*, 522.

MORTGAGES AND DEEDS OF TRUST—Continued.

3. ———: ———: ———: **Agreement for Abstract of Title.** An agreement that, before any notes secured by a deed of trust were sold, an abstract of all conveyances of record affecting the title to the land should be furnished to the purchaser, showing that the deed of trust securing the notes was recorded and that the title approved by the purchaser or his attorney, is one made in the interest of and as a protection to the purchaser, and a failure by the purchaser to require these things, will not relieve the partner of the man who conducted the transaction and imposed a forged and fraudulent note on the purchaser, from reimbursing the loss due to the false representations. Besides, in this case, there is no substantial evidence of such an agreement. *College v. Dockery*, 522.
4. ———: ———: ———: **Sharing Commissions with Purchaser.** An honest agreement by the firm making the loan to share the commissions with the lender's treasurer, is immaterial when the firm is sued for fixing up and imposing on the lender a fictitious and fraudulent note. If it was not honest, but a part of a scheme to defraud the lender, entered into by its treasurer and the firm, then the firm was a party to it, and it is still no defense to any member of the firm. *Ib.*
5. ———: ———: ———: **Negligence of Lender.** The defrauded member of the firm making the loan has no right to complain of the negligence of the lender in not sooner discovering the fraud if he himself, having the means at hand, did not sooner discover it. The partner who has done no wrong cannot be heard to charge the lender with such negligence unless the defrauding partner could make it. *Ib.*
6. **Fraud: Limitations: Discovery: Pleading.** It is not always necessary for a plaintiff, in an action for fraud and deceit, to which the defense of the Statute of Limitations is interposed, to aver that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate. And if he merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, the defendant cannot, on appeal, complain of the defect in the pleading.
Held, by WOODSON, J., dissenting, that in order for plaintiff to avail himself of the exception to the Statute of Limitations which prevents it from running, it was necessary to plead it; and that necessity for the plea was not waived by defendant, for when evidence was offered to sustain the exception the defendant objected, and one objection is enough. *Ib.*
7. ———: ———: ———: ———: **Defects Available on Appeal: No Demurrer.** It is only when a pleading fails to state a cause of action or a defense, or fails to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. And an objection to a petition that it does not state a cause of action, made after the answer is filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable a consideration as a general demurrer timely interposed. In such case, if by

MORTGAGES AND DEEDS OF TRUST—Continued.

reasonable inference from the facts stated, a cause of action can be constructed, it is the duty of the court to do so. *Ib.*

8. ———: ———: **Plea: No Reply: Practice: Appeal.** A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it; but the usual course is to wait until the answer is filed pleading the statute, and then avoid it by a reply. But in such case if plaintiff should fail to file a reply to the plea and the cause goes on to trial and proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on file, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings. *Ib.*

9. ———: ———: **Concealment: Diligence: Partners.** The law does not require of one that he should suspect fraud; on the contrary, all transactions are presumptively honest. Where there has been concealment, or where there is a relationship of trust and confidence, or where there is nothing in the transaction at the time the fraud is perpetrated, and nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out. On the other hand, the law requires the defrauded person to be reasonably watchful of his interests, and will not relieve him from it if he has been negligent in that respect.

Where a firm had in a course of dealing running through two or three years been trusted with absolute faith by a college in the loaning of its money, and soon after it had begun making loans through the agency of the firm sent its representative to inquire into the firm's standing in the community and to view the securities, and was assured by the defendant partner that the other partner had the business of these loans in hand, and then after the confidence of the college was entirely obtained, the other partner used an impecunious person named Smith to obtain a loan on his own land and had the notes signed by Smith, and in the firm name certified that there were no mortgages or liens on the land except the deed of trust securing this loan to Smith, which had been assigned to the firm, that the title was good in Smith and the deed of trust recorded, and when the notes were received by the college it honored the firm's draft, and thereupon the defaulting partner placed the amount to the firm's credit and checked it out, and paid the interest for three years, concealing the whole transaction from defendant and the college for that length of time, the college cannot be held to be negligent of its duty in not sooner discovering the fraud, and the Statute of Limitations did not begin to run against the college when the fraud was first perpetrated, but only upon its discovery by the college.

Held, by WOODSON, J., dissenting, (1) that the loss occurred through the negligence of the college in not demanding for three or four years the deed of trust which it was agreed should be furnished to it as security for the loan; and (2) the most ordinary business prudence on the part of the college would have exposed the fraud, and when so exposed the five-year Statute of Limitations would have at once begun to run, and the suit is barred on that theory.

Held, by GRAVES, J., dissenting, that knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to the discovery of fraud; and

MORTGAGES AND DEEDS OF TRUST—Continued.

applying this rule, the facts show that the well established rule of doing business between the college and the partnership required the firm to forward to the college, along with the notes, an abstract of title, a certificate of title of a certain firm of attorneys, and a deed of trust recorded, and a failure to forward any of these things within a reasonable time was sufficient to put the college, or any prudent person, upon inquiry, and to start the Statute of Limitations to running.

Held, by BROWN, J., dissenting, that the college might have waived the delivery of the abstract of title and the certificate of their attorneys, in view of the certificate of the firm, who were abstracters, that the title was vested in Smith; but as it had always been the custom for the college to receive a deed of trust whenever it made a loan, and none was sent in this case and no inquiry was made why it was not sent, and no investigation was made, the college was guilty of gross negligence, which was sufficient to set the statute to running. *College v. Dockery*, 522.

10. **School Fund Mortgage: Statutes: Secs. 10817 and 10819: Construed Together.** Section 10817, Revised Statutes 1909, providing that a school fund mortgage shall contain a condition that if default be made in the payment of the principal or interest the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, without suit on the mortgage, proceed to sell the mortgaged premises, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a court of competent jurisdiction foreclosing the mortgage; and section 10819, Revised Statutes 1909, providing that when the principal secured by a mortgage containing a power of sale shall become due and payable the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same with costs upon the property conveyed by the mortgage, and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a *fiert factas* on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly, are to be construed together; and if the sheriff undertakes to sell the mortgaged property when no order of the county court directing him to sell was made, his act is null and void. *Neil v. Tubb*, 666.
11. ———: **Foreclosure and Sale by Sheriff: No Order of Court.** A sale by the sheriff of the mortgaged property, mortgaged to the county by a school fund mortgage, when no order of the county court directing him to sell has been made, as required by section 10819, Revised Statutes 1909, is null and void. *In*.
12. ———: ———: ———: **Nunc Pro Tunc Order: Fictitious Proceeding: Notice.** When a court at a former term made an order or rendered a judgment which should have then been entered of record but was not, it may be entered at a subsequent term as for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term, and then it becomes a *nunc pro tunc* order or judgment; but when entered it is not the order or judgment now made, but the one then made. Where the county court at its May term, 1905, failed to make an order to the sheriff, reciting the debt and interest due on a school fund mortgage, and commanding him to levy the same, with costs,

MORTGAGES AND DEEDS OF TRUST—Continued.

upon the mortgaged property, an order made at the February term, 1907, after the property had been sold by the sheriff and the mortgage marked satisfied on the record by the clerk, calculating interest on the bond down to date and declaring the mortgage was then due and unpaid, was not a *nunc pro tunc* order, but in all respects in form an original order. Nor did the court at that February term have any right to make an order declaring the mortgage was due and unpaid, and with that statement as a basis order a sale of the land; and, if plaintiff, or her grantor, who purchased at the sheriff's sale made in pursuance thereof, knew all these facts, she did not acquire the title, for that was a fictitious proceeding. Ib.

13. ———: ———: ———: Order Recited in Clerk's Certificate. A clerk's order to the sheriff to sell the mortgaged property, reciting therein that the county court had previously made an order to that effect, when in fact no such order had been made, was an unauthorized act, and cannot be held to supply the order itself. The only act in that regard that the statute authorizes the clerk to perform is to make a certified copy of the order of the court and deliver it to the sheriff. Ib.
14. ———: ———: ———: Report of Sheriff Approved. Nor does the fact that the sheriff, who sold the mortgaged property when there was no order of the court directing him to sell, reported the sale to the county court and the court approved it, give any validity to the sale. The court cannot by its approval give validity to an unauthorized act. Ib.
15. ———: ———: ———: Collateral Attack: Ejectment. The defendant in an action of ejectment, to which she has answered by a general denial, has the right to defend her possession, and when plaintiff offers proof of his title to object to it for infirmities apparent on its face. Defendant in such case does not seek to have annulled the sheriff's deed under which plaintiffs' claims, made in the foreclosure of a school fund mortgage without an order of court, nor does she make a collateral attack upon that deed, but she simply requires plaintiff to make legal proof of his title. Ib.

MOTION.

1. Attorney: Right to Practice: Probate Judge: Motion to Practice. Where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof. State ex rel. v. McElhinney, 592.

MOTION—Continued.

2. ———: ———: **Motions: Appeals.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom. *State ex rel. v. McElhinney*, 592.

MOTION FOR NEW TRIAL.

1. **General Assignment: Usually Insufficient: Exception.** The motion for a new trial should call the court's attention to the specific point of law on which it is claimed the court failed to instruct; otherwise it will ordinarily be insufficient; but where an examination of the record reveals that the court failed to instruct on a matter of law that goes to the fundamental rights of the defendant, and that by such failure injustice may have been done, or a verdict returned which would not have been had such failure not occurred, the Supreme Court, in the interest of justice, will grant a new trial, though the point be presented in it for the first time. *State v. Conway*, 271.
2. **Abstract: Motion Called for in Bill: Printed in Record Proper.** A motion for a new trial, which the bill of exceptions says was made a part thereof and which further says that the motion is not reprinted as a part of the bill since it is printed under abstract of record proper if, in fact it is so printed, will be considered on appeal. But such method of printing the motion is not approved. Its proper place is in the bill of exceptions. *Mugan v. Wheeler*, 376.
3. **One Exception: Two Motions.** Exceptions saved to one order overruling the motion for a new trial and the motion in arrest, preserve for review the action of the court upon both motions. *Ib.*
4. **Not Made a Ground for New Trial.** The disposition made of the referee's report is not for consideration on appeal unless the court's action in reference thereto is made a ground in the motion for a new trial. *Campbell v. Boyers*, 421.

MOTOR VEHICLE TAX. See *Road Funds*.

MUSEUM OF FINE ARTS. See *State ex rel. v. St. Louis*, 231.

NEGLIGENCE.

1. **Employee of Sewer Contractor: Powers of Supervision Reserved by City: Liability of City for Independent Contractor's Negligence.** Powers of supervision and control as to quality of material and methods of construction reserved to the city engineer in a contract for the construction of a sewer, which specified at length and in detail the work to be done and materials to be used, and required all materials and labor to be furnished and paid for by the contractor, who was to be paid for a completed sewer a lump sum, were reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection, and neither the contractor nor his

NEGLIGENCE—Continued.

servants have any ground of complaint because the city failed to exercise such power of supervision; nor could an employee of the contractor, engaged in drilling holes to be charged with dynamite and giant powder by the contractor's foreman, look to the city inspector to protect him from unexploded charges; and if the foreman was guilty of negligence in not informing him that the dynamite in a certain charged hole had not exploded, and in consequence he was injured, he cannot hold the city liable for the foreman's negligence and his consequent injuries, on the theory that the city engineer had very extensive powers of supervision and control over the manner of performing the work. Such reserved powers of control did not authorize the engineer to step in between the contractor and his servants, and direct the servant in the details of his work.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the relation of independent contractor did not exist unless (1) the city selected a competent and fit person, engaged in an independent calling, to do the work; unless (2) the work committed to the contractor was not attended with danger to others, nor unlawful; and unless (3) the contractor was allowed to do the work according to his own methods and only subject to control by the city as to the result of the work. And as the petition charges that the contractor was not competent, skillful or fit, that the blasting of rock in excavating for the sewer was attended with danger to others, and that the contractor was not permitted to do the work according to his own methods, it states a cause of action against the city for the injury to the contractor's servant due to the negligence of his foreman. *Salmon v. Kansas City*, 14.

2. ———: ———: Power to Direct Discharge of Incompetent Workmen. Nor did a privilege reserved by the city to require the contractor to discharge incompetent workmen prevent the full application of the doctrine of independent contractor, or make the city liable for the injury of one of the contractor's servants due to the negligence of his foreman. Such provision in the contract was inserted to enable the city to secure good work at the hands of competent workmen; not to protect workmen against incompetent foremen. *Ib*.
3. ———: Liability of City for Injury to Independent Contractor's Servant: Blasting on Public Street: Intrinsically Dangerous. Holding in view the rule of law that a municipality cannot authorize acts upon a public street which are intrinsically dangerous and which in themselves constitute a nuisance or a menace to the lives and property of others, and that it is no defense to the liability of the city to show that the performance of the inhibited act is delegated to an independent contractor, it is nevertheless *held* that the protection of the rule does not extend to an employee of an independent contractor who is compelled in excavating for the sewer to use dynamite in blasting rock, nor is blasting so intrinsically dangerous that when the city authorizes its use by an independent contractor it becomes liable for resulting injury. The doctrine is applicable to injuries to passers-by or near-by property. It certainly cannot be invoked to hold liable the city when the injury to the servant of the independent contractor was due to the sheer negligence of the contractor's foreman in failing to protect

NEGLIGENCE—Continued.

the servant in work which in itself is not inherently dangerous, namely, in permitting the servant to return to drilling holes without discovering and notifying him that the dynamite in one of the holes of a previous charge had not exploded.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN JJ., concur, that the contractor is not an independent contractor if he is an incompetent and unfit person, and where he is incompetent and unfit the city is liable for any injuries due to his incompetence, and that the rule applies to injuries to passers-by and to servants of the *pseudo*-contractor, and its protection extends to the one as well as to the other.

Held, also, that the use of dynamite in blasting is intrinsically dangerous, and the city is responsible, as for its own negligence, if it fails to see that the contractor uses such care as the hazard requires. *Salmon v. Kansas City*, 14.

4. ———: ———: Incompetent Contractor. The city owes no duty to the servant of an independent contractor with whom it has contracted for the construction of a sewer, to provide him a competent and skillful employer. It is no ground for holding the city liable for the servant's injury that the contractor (his employer) was incompetent, or insolvent, and known to the city to be so.

Held, by BOND, C., dissenting, with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur, that the city does owe to the servant engaged by a contractor to work on a city sewer, the duty to let its contract to a competent and skillful person, and if it fails in that duty it is liable for any injury to such servant due to the negligence of such incompetent contractor or of his foreman. *Ib.*

5. ———: ———: Failure to Enforce Ordinance: Blasting by Person Not Licensed. A city is not liable in damages for failure to enforce its ordinances. Liability against the city for injury to the servant of an independent sewer contractor, who was injured by the unexpected explosion of a charge of dynamite used in blasting, cannot be predicated upon the city's failure to enforce an ordinance requiring a license to qualify one to do blasting.

Held, by BOND, C., with whom VALLIANT, C. J., and KENNISH and BROWN, JJ., concur that for negligence and breach of duty in failing to require the observance of its ordinance safeguards against injury which it contracted should be observed, the city is liable. Where the city's contract with the contractor for a district sewer stipulated and covenanted that each and all of its ordinances applicable to the doing of the work should be complied with, including the ordinance regulating blasting and requiring that only competent and licensed persons should engage in that hazardous work, that obligation inured to the benefit of all persons who would be injured by its breach, and the city is liable to any person injured as a result of the neglect of that duty. Such a cause of action, being based on negligence and a breach of contract, is a very different thing from one originating in a non-enforcement of a police regulation. *Ib.*

NEGLIGENCE—Continued.

6. **Humanitarian Rule: Settled Law.** Although plaintiff was a trespasser and, in full possession of all her faculties, walked for a quarter of a mile on defendant's track without looking behind her for a train, it will not be held she was guilty of such palpable contributory negligence as defeats her recovery as a matter of law, regardless of defendant's own negligence. Even under such circumstances, if those in charge of the locomotive saw her and realized her danger, it became their duty to do what they could, with the means at hand, to avoid injuring her. That is the humanity doctrine, which has become a fixed principle in the law of negligence. That rule is: When one is negligently upon a railroad track, unconscious of his immediate peril, and that peril is timely discovered by those in charge of the engine, they may not punish him for his negligence by knocking him off, but must use due care to avoid injuring him. *Dutcher v. Railroad*, 137.
7. ———: **Due Care.** The gauge of due care arises precisely with the obvious danger and the circumstances of the individual case. In one case the monotonous stroke of the bell might be the due care which those in charge of the engine must use to avoid injuring a trespasser on the track; in other cases the alarm whistle timely given might be due care; in an extreme case nothing short of stopping the train would be due care. *Ib.*
8. ———: ———: **Trespassers: Duty to When Seen.** Those in charge of the engine are under no duty to look out for a trespasser on the railroad track in the country away from congested populations and between public crossings, absent a known and permitted public user; but excepting the duty not to look out for trespassers, the duty to use due care not to kill or maim them if they are seen in time, is precisely the duty owed to those not trespassers. *Ib.*
9. ———: **Alarm Signals: Intervening Confusion.** When a condition intervenes to confuse or prevent a trespasser on the track from hearing an alarm signal, or where the conduct and actions of the trespasser walking on the track with his back to an oncoming locomotive should cause an engineer of ordinary prudence to conclude that such party does not or cannot hear alarm signals, and he continues to walk on the track, the right of the engineer to act upon the presumption that the trespasser will leave the track before being struck ceases. *Ib.*
10. ———: **Duty to See: Applicable to Defendant.** He who shuts his eyes when to open them and look is to see, is presumed to see. And this truism applies to defendant as well as to plaintiff, when due care requires defendant to see. *Ib.*
11. ———: **Duty to Woman on Track.** The engineer of a train is chargeable with the duty to know and realize that the actions of a young woman walking on a railroad track, with her back to him, in the open country between public crossings, her hat in her hand, never looking back and apparently oblivious to danger, unmistakably indicate that she has not heard the crossing signals behind her. It is 'not natural for a woman to trifle with death by remaining on the track after hearing the alarm signals behind her; and natural instincts constitute evidence to men of sense. *Ib.*

NEGLIGENCE—Continued.

12. ———: ———: Noise from Train on Near-by Track. On parallel railroads, 100 feet apart, two freight trains were moving in opposite directions. The one on defendant's road was running extra, was 510 feet long, made up of twelve loaded freight cars, the rear four of which were non-air cars, but the other eight and the engine well equipped with air, and the train was running from twenty-five to thirty miles an hour, on an upgrade of twenty-seven feet to the mile, on a track that lay on a fill. The other train consisted of twenty-five freight cars, was over 1000 feet long, running about twenty miles an hour on a slightly down grade, and made a great deal of noise. Plaintiff, a school teacher, nineteen years of age, in full possession of all her faculties, about 4:30 in the afternoon of September 6th, accompanied by a girl of ten years, left the public road at a crossing and walked north on defendant's track, and at about one-quarter of a mile from the crossing was struck by defendant's train which approached from the south. The afternoon was clear, bright and warm, and plaintiff, bareheaded and carrying a lunch satchel and a box of wild haws, faced steadily to the north, and neither she nor the child at any time looked back or in any wise indicated a knowledge that a train was approaching from behind. At the time the defendant's train struck her the caboose of the other train was just opposite or had passed her 100 feet or so. The tracks were straight, unobstructed, and when defendant's train was a mile or a mile and a half from plaintiff and the child, the engineer saw them going north on the track, with their backs to him, and thereafter kept them under his eye, and also saw the train on the opposite track coming to meet his and that the trains would meet each other just about the time his train would overtake her. He sounded the signal at the crossing, which she did not seem to hear. According to his testimony when he was 600 or 700 feet from her, and according to other testimony when he was 180 to 200 feet behind her, he simultaneously began to sound the alarm signals and turned on the full force of the emergency air, but she at no time heard the train and did not know until after she had regained consciousness what had struck her. The train stopped after striking her, and its south end was sixty-eight feet north of the point of the accident, that is, the train ran 578 feet beyond that point, though some witnesses say the distance was eleven or twelve hundred feet. There was testimony that it could have been stopped in 300 or 400 feet, if it was then running at the rate the defendant's witnesses testified it was. The men on the train on the parallel road saw plaintiff's peril and did their best to draw her attention, by shouting and motioning, to the defendant's train bearing down upon her; but she supposed they were flirting with her, and at no time turned her head to look back. It is admitted that the train could not have been stopped after the alarm signals were first given before striking her. *Held*, first, that a demurrer to the evidence should not have been sustained; second, whether or not the act of the engineer, with everything to be seen lying right under his eye, in allowing the situation to drift and delaying to attempt to stop the train until the near approach and noise of the train on the other track made it a matter of doubt whether or not the alarm signals would reach her and be effective, was the exercise of due care to avoid striking her, was a question for the jury, and their verdict holding his act to be negligent cannot be disturbed by the appellate court; and, third, there being

NEGLIGENCE—Continued.

a conflict in the testimony as to whether the train was 700 or 180 feet from her when the alarm signals were first sounded and the air brakes applied, that testimony also raised a question of diligence and care as to the time of giving the signals, which was for the jury.

Held, by WOODSON, J., dissenting, first, that there was no substantial testimony to contradict that of numerous witnesses that the danger signals were repeatedly given in ample time for plaintiff to have stepped from the track before being struck; second, that plaintiff unquestionably heard the danger signals, and that the engineer had the right to presume that plaintiff heard the signals and would step out of the danger line until he had reasonable ground to apprehend that she was ignorant of the train's approach and had not heard the signals; third, that plaintiff was guilty of the grossest negligence, which continued down to the place and instant of her injury, and therefore the humanitarian doctrine does not apply to the case, since the rule is that, if the negligence of plaintiff continues down to the time of the accident that doctrine has no application; fourth, since the engineer had a right to presume that plaintiff would heed the alarm signals which she heard or could have heard had she not been negligent in not trying to hear, and since it was impossible to have stopped the train before striking her after the signals were given, defendant is not to be held to have failed to exercise ordinary care in not sooner attempting to stop the train; and, fifth, even though it be conceded that defendant was guilty of negligence in not sooner stopping the train, yet as her own negligence continued down to the very instant she was struck, the concurrent negligence of both should bar her recovery. *Dutcher v. Railroad*, 137.

13. **Appellate Practice: Weight of Testimony: Matter for Jury.** The Supreme Court has nothing to do with the weight of testimony in a law case. Its function is to say whether there was any substantial testimony. It will not uphold a verdict supported by only a mere glimmer or spark, a mere *scintilla*, of testimony; but if there is substantial testimony, however small as compared with the great body of proof, the appellate court has no right to meddle with the weight of it, or ignore it because negative in character. *Ib.*
14. ———: ———: ———: **Negative Testimony: New Trial.** Nor can the Supreme Court reverse a verdict for plaintiff though it rest alone upon testimony negative in character, if that testimony is substantial. Where the nineteen-year-old plaintiff was bareheaded and had good ears, yet neither she nor the ten-year-old child with her heard any alarm signal from the train approaching from behind, the appellate court will not say that the signals were sounded though several other witnesses, both interested and disinterested, positively testify they were sounded. The trial court, under such circumstances, might properly grant a new trial to defendant on the ground that the verdict was against the great weight of the credible testimony; but that negative testimony was substantial, and in the face of it the appellate court has no right to reverse a verdict for plaintiff, even if the failure to sound the alarm signals were the only issue of negligence in the case. *Ib.*

NEGLIGENCE—Continued.

15. **Pedestrian on Track: Failure to Stop Train: Depending on Alarm Signals: Confusion of Noises.** A railroad engineer does not use due diligence in applying the emergency brakes, if a large train is passing on a near-by parallel track, making so much noise that the sounding of the alarm signals is drowned in its volume, and, depending on those signals to draw the attention of a trespasser on the track, he waits to apply the emergency brakes until it becomes impossible with the means at hand to stop the train before striking her. His duty, under such circumstances, is to stop before hitting her. And under the circumstances of this case the engineer knew or was bound to know, which amounts to the same thing, that he could not stop his train after he first applied his brakes before striking plaintiff. *Dutcher v. Railroad*, 137.
16. ———: **Instruction: Reliance on Rumbling of Train to Give Notice.** An instruction telling the jury that no warning signals were necessary until the engineer discovered that the trespassers on the track, within the sound zone of a much greater train on a near-by track, did not hear the rumbling of his train, was properly refused. *Ib.*
17. ———: ———: **Not Looking.** An instruction which precludes a recovery by the trespasser because she walked leisurely down the track without turning her head, and this although the jury believe "no signal was given nor effort made to stop the train," should be refused. It is not the law of a case falling within the humanitarian doctrine. *Ib.*
18. ———: ———: **Due Care: What is Stopping and Signal Distance.** An instruction declaring that an alarm signal at 600 feet from the pedestrian on the track was due care and that the engineer was not required to stop the train when he came in stopping distance of her, was, under the circumstances of this case, properly refused. And as also was another instruction declaring as a matter of law that if the alarm signals and attempts to stop the train began 600 feet from plaintiff and continued until she was struck she could not recover, properly refused, for it invaded the right of the jury to determine what was due care under the peculiar circumstances of this case. *Ib.*
19. ———: ———: **Noise of Another Train: Not Looking Behind.** An instruction telling the jury that it was the imperative duty of the pedestrian on the track, because of the great noise made by a train passing in the opposite direction on a near-by track, to look behind to see if the train that struck her was approaching, and if she failed in that duty she could not recover, was properly refused. In effect, it was a mandatory instruction for defendant. *Ib.*
20. ———: ———: **Wantonness: Humanity Rule.** The court should not tell the jury in a case resting on the humanitarian rule that the railroad company owed no duty to a pedestrian walking on its track except to not willfully or wantonly injure her. The willfulness and wantonness doctrine is exploded. The touchstone of duty in the law of negligence is due care, not a shade less or more. *Ib.*
21. ———: ———: **Alarm Signals Not Heard for Noises.** An instruction based on the theory that if the alarm signals were

NEGLIGENCE—Continued.

timely given but could not be heard because of the noises made by a train on another near-by track, the pedestrian could not recover for injuries received by being run down by the train, is not the law of a case resting on the humanitarian doctrine. Due care does not, because of the noises, exclude the duty to stop the train in time to avoid the injury. *Ib.*

22. ———: ———: **Limiting Distance for Signals.** An instruction declaring the law to be that if the whistle was blown from three to six hundred feet from plaintiff as she walked on the defendant's railroad track with her back to the approaching train, and afterwards until she was struck, and the engineer did all in his power to save her after discovering she did not get off the track to avoid her own injury, then the verdict must be for defendant, under the circumstances of this case invaded the province of the jury, by limiting the distance in which the engineer was obliged to begin an effort to warn and save plaintiff to within three to six hundred feet, and therefore was properly refused. *Ib.*
23. **Pleading: Noises of Another Train: Proof.** The noises of a train on another near-by track, and the fact that any experienced person observing that train going in one direction and the one which struck defendant going in the other could see that the two would pass about the place plaintiff was struck, are evidential matters, and proof of them may be made under a charge of a failure to use due care, without pleading them as specifications of negligence. *Ib.*
24. **Trespasser: Instruction: No Duty Except to Sound Alarm.** An instruction which excludes any duty of the engineer to a trespasser to stop the train under any circumstances is bad; and a modification by inserting the words "in the first instance" in the clause declaring that "the defendant owed to her no duty, in the first instance except to warn her by the usual signals of the approach of the train in time for her to step off the track and avoid being struck," was more favorable to defendant than it was entitled to, since under the testimony the situation demanded the instantaneous application of the air brakes with the blowing of the whistle. *Ib.*
25. **Excessive Verdict: \$10,000.** Plaintiff, nineteen years old, a school teacher, while walking on a railroad track, was struck by a train. She was taken up unconscious, remained unconscious for days, was injured on her head, an arm and leg were broken, she was disfigured, one of her feet and the toes of that foot are drawn out of place, making her club-footed and lame, one arm is crooked and there is a catch in the elbow of it, and she is a cripple for life. *Held*, that a verdict for \$10,000 is not excessive. *Ib.*
26. **Remarks of Counsel: Reasonable Verdict, etc.** The straying by plaintiff's counsel in the heat of argument a little out of the record, for which he was admonished by the court, in a case which is not a close one in which the size of the verdict does not show inflamed minds in the jurors, will not justify a reversal or a new trial. *Ib.*

NEW TRIAL.

1. **Order Granting New Trial: Not Preserved: Appellate Practice.** Where the order granting to defendants a new trial is not set out in the record, the presumption will be indulged, on appeal, in favor of the court's action, and it will be upheld if sustainable upon any of the grounds of the motion for a new trial. *Peper v. Peper*, 260.
2. ———: **Appellate Practice: Sustained by Substantial Evidence.** Where under the facts and circumstances in evidence it cannot be said that there was no substantial evidence against the finding and decree of the court, the appellate court will not hold that the trial court erred in granting to defendants one new trial, where in their motion therefor they aver that the judgment is contrary to the evidence and that there is no evidence to support the judgment quieting the title in plaintiff. *Ib.*
3. ———: ———: **Judgment on Merits.** But where the appellate court has reached the conclusion that the trial court did not err in granting to defendants one new trial, it will not go further and review the case on the merits and direct the trial court to set aside the order granting a new trial and render judgment for defendants. There is no final judgment after the order granting a new trial was entered, and the appellate court's duty, on an appeal from that order, is to review only the court's action in granting the new trial. *Ib.*
4. **New Trial: Combined Subject-Matter of Action: Severed by Order.** Two contiguous, separately described tracts of land were included in each count of the petition in this action to quiet title and for ejectment, and combined also in the finding and judgment of the trial court. Upon a general motion for a new trial, the court ordered a new trial as to one tract, but not as to the other. *Held*, that such order must be taken as opening the whole case for retrial as to both tracts. *Slicer v. Owens*, 319.
5. **Granting New Trial: Appeal.** Where the trial court, after deciding the many things in issue upon evidence which left many of them uncertain, and after giving judgment, sets aside its findings and grants a new trial, the order granting a new trial must be affirmed. *Ib.*
6. **Bill of Exceptions: Lost New Trial: Negligence of Counsel and Clerk.** Respondent should not be penalized by another trial, and its uncertainty, because of the negligence and carelessness of counsel for appellant, or the misconduct of the clerk in permitting counsel for other defendants to remove the bill of exceptions from his office and to retain them for years without inquiry as to their safety or whereabouts. *Graves v. Chapman*, 650.
7. ———: ———: ———: **Deceased and Scattered Witnesses.** It would be unjust to respondent to grant appellant a new trial after the witnesses are scattered or dead, simply because the bill of exceptions, through no fault of respondent, has been lost or destroyed. *Ib.*
8. ———: ———: ———: **Status Quo.** A new trial because of a loss of the original bill of exceptions should not be granted

NEW TRIAL—Continued.

where the parties at a new trial would not be *in statu quo* and where appellant permitted three years to elapse after the bill was lost or destroyed without making any effort to supply it. *Ib.*

NUNC PRO TUNC ACTION.

1. **School Fund Mortgage: Foreclosure and Sale by Sheriff: No Order of Court: Fictitious Proceeding: Notice.** When a court at a former term made an order or rendered a judgment which should have then been entered of record but was not, it may be entered at a subsequent term as for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term, and then it becomes a *nunc pro tunc* order or judgment; but when entered it is not the order or judgment now made, but the one then made. Where the county court at its May term, 1905, failed to make an order to the sheriff, reciting the debt and interest due on a school fund mortgage, and commanding him to levey the same, with costs, upon the mortgaged property, an order made at the February term, 1907, after the property had been sold by the sheriff and the mortgage marked satisfied on the record by the clerk, calculating interest on the bond down to date and declaring the mortgage was then due and unpaid, was not a *nunc pro tunc* order, but in all respects in form an original order. Nor did the court at that February term have any right to make an order declaring the mortgage was due and unpaid, and with that statement as a basis order a sale of the land; and, if plaintiff, or her grantor, who purchased at the sheriff's sale made in pursuance thereof, knew all these facts, she did not acquire the title, for that was a fictitious proceeding. *Neil v. Tubb*, 666.
2. ———: ———: ———: **Order Recited in Clerk's Certificate.** A clerk's order to the sheriff to sell the mortgaged property, reciting therein that the county court had previously made an order to that effect, when in fact no such order had been made, was an unauthorized act, and cannot be held to supply the order itself. The only act in that regard that the statute authorizes the clerk to perform is to make a certified copy of the order of the court and deliver it to the sheriff. *Ib.*
3. ———: ———: ———: ———: **Report of Sheriff Approved.** Nor does the fact that the sheriff, who sold the mortgaged property when there was no order of the court directing him to sell, reported the sale to the county court and the court approved it, give any validity to the sale. The court cannot by its approval give validity to an unauthorized act. *Ib.*

OPINION IN FORMER CASE. See *Stare Decisis*.

PARTNERSHIP.

1. **Fraud by One Partner: Liability of Other.** For the act of a partner, done in the name of the firm and within the scope of the partnership business, the other member of the firm is liable; and the fact that he himself has done no wrong, is immaterial. One partner has authority to bind the firm in all transactions within the scope of the partnership business; and the misrepresentation of facts, made by one partner to a

PARTNERSHIP—Continued.

client of the firm who is held out to such client by the other as authorized to act for the firm, is binding on the firm; and if that other partner represents, within the scope of the firm's business, that the title to a piece of land is good in the fictitious owner, and thereby the client is induced to loan money thereon, which is appropriated by the defaulting partner who in the name of the firm has the transaction in hand, the firm and the other partners are liable for the money. *College v. Dockery*, 522.

2. ———: ———: **Mortgage. Agreement for Abstract of Title.** An agreement that, before any notes secured by a deed of trust were sold, an abstract of all conveyances of record affecting the title to the land should be furnished to the purchaser, showing that the deed of trust securing the notes was recorded and the title approved by the purchaser or his attorney, is one made in the interest of and as a protection to the purchaser, and a failure by the purchaser to require these things, will not relieve the partner of the man who conducted the transaction and imposed a forged and fraudulent note on the purchaser, from reimbursing the loss due to the false representations. Besides, in this case, there is no substantial evidence of such an agreement. *Ib.*
3. ———: ———: **Sharing Commissions with Purchaser.** An honest agreement by the firm making the loan to share the commissions with the lender's treasurer, is immaterial when the firm is sued for fixing up and imposing on the lender a fictitious and fraudulent note. If it was not honest, but a part of a scheme to defraud the lender, entered into by its treasurer and the firm, then the firm was a party to it, and it is still no defense to any member of the firm. *Ib.*
4. ———: ———: **Negligence of Lender.** The defrauded member of the firm making the loan has no right to complain of the negligence of the lender in not sooner discovering the fraud if he himself, having the means at hand, did not sooner discover it. The partner who has done no wrong cannot be heard to charge the lender with such negligence unless the defrauding partner could make it. *Ib.*
5. **Fraud: Limitations: Discovery: Pleading.** It is not always necessary for a plaintiff, in an action for fraud and deceit, to which the defense of the Statute of Limitations is interposed, to aver that he used diligence to discover the fraud, because if he had no reason to suspect fraud he was not called upon to investigate. And if he merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, and evidence is heard tending to show that it was the conduct of the defendant that allayed suspicion, the defendant cannot, on appeal, complain of the defect in the pleading.
Held, by WOODSON, J., dissenting, that in order for plaintiff to avail itself of the exception to the Statute of Limitations which prevents it from running, it was necessary to plead it; and that necessity for the plea was not waived by defendant, for when evidence was offered to sustain the exception the defendant objected, and one objection is enough. *Ib.*

PARTNERSHIP—Continued.

6. ———: ———: ———: ———: **Defects Available on Appeal: No Demurrer.** It is only when a pleading fails to state a cause of action or a defense, or fails to show jurisdiction in the court, that the defect can be complained of for the first time in the appellate court. And an objection to a petition that it does not state a cause of action, made after the answer is filed and just as the trial is about to begin, and which comes then only in the form of an objection to the introduction of any evidence, is not entitled to as favorable a consideration as a general demurrer timely interposed. In such case, if by reasonable inference from the facts stated, a cause of action can be constructed, it is the duty of the court to do so. *Ib.*
7. ———: ———: **Plea: No Reply: Practice: Appeal.** A party may, if he choose, anticipate a plea of the Statute of Limitations and state facts in his petition to avoid it; but the usual course is to wait until the answer is filed pleading the statute, and then avoid it by a reply. But in such case if plaintiff should fail to file a reply to the plea and the cause goes on to trial and proof is introduced avoiding the statute, and the issue is tried as if a sufficient reply was on trial, the losing party cannot raise the objection in the appellate court that the issue was not properly presented in the pleadings. *Ib.*
8. ———: ———: **Concealment: Diligence: Partners.** The law does not require of one that he should suspect fraud; on the contrary, all transactions are presumptively honest. Where there has been concealment, or where there is a relationship of trust and confidence, or where there is nothing in the transaction at the time the fraud is perpetrated, and nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out. On the other hand, the law requires the defrauded person to be reasonably watchful of his interests, and will not relieve him from it if he has been negligent in that respect. Where a firm had in a course of dealing running through two or three years been trusted with absolute faith by a college in the loaning of its money, and soon after it had begun making loans through the agency of the firm sent its representative to inquire into the firm's standing in the community and to view the securities, and was assured by the defendant partner that the other partner had the business of these loans in hand, and then after the confidence of the college was entirely obtained, the other partner used an impecunious person named Smith to obtain a loan on his own land and had the notes signed by Smith, and in the firm name certified that there were no mortgages or liens on the land except the deed of trust securing this loan to Smith, which had been assigned to the firm, that the title was good in Smith and the deed of trust recorded, and when the notes were received by the college it honored the firm's draft, and thereupon the defaulting partner placed the amount to the firm's credit and checked it out, and paid the interest for three years, concealing the whole transaction from defendant and the college for that length of time, the college cannot be held to be negligent of its duty in not sooner discovering the fraud, and the Statute of Limitations did not begin to run against the college when the fraud was first perpetrated, but only upon its discovery by the college.

PARTNERSHIP—Continued.

Held, by WOODSON, J., dissenting, (1) that the loss occurred through the negligence of the college in not demanding for three or four years the deed of trust which it was agreed should be furnished to it as security for the loan; and (2) the most ordinary business prudence on the part of the college would have exposed the fraud, and when so exposed the five-year Statute of Limitations would have at once begun to run, and the suit is barred on that theory.

Held, by GRAVES, J., dissenting, that knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to the discovery of fraud; and applying this rule, the facts show that the well established rule of doing business between the college and the partnership required the firm to forward to the college, along with the notes, an abstract of title, a certificate of title of a certain firm of attorneys, and a deed of trust recorded, and a failure to forward any of these things within a reasonable time was sufficient to put the college, or any prudent person, upon inquiry, and to start the Statute of Limitations to running.

Held, by BROWN, J., dissenting, that the college might have waived the delivery of the abstract of title and the certificate of their attorneys, in view of the certificate of the firm, who were abstracters, that the title was vested in Smith; but as it had always been the custom for the college to receive a deed of trust whenever it made a loan, and none was sent in this case and no inquiry was made why it was not sent, and no investigation was made, the college was guilty of gross negligence, which was sufficient to set the statute to running. *College v. Dockery*, 522.

9. **Scope of Authority: Finding of Fact.** A finding by the trial judge sitting as a jury that the defaulting partner acted outside the scope of his authority, is not a finding of fact, but is only an opinion on a point of law. *Ib.*
10. **Fraud and Deceit: Appellate Practice: Simple Reversal.** Where all the facts are before the court in an action of fraud and deceit, tried by the court sitting as a jury, there is no necessity for a new trial; and the judgment for defendant being wrong, it will simply be reversed, and the trial court directed to enter judgment for plaintiff. *Ib.*

PAYMENT IN PART. See *Satisfaction*.

PAYMENT, VOLUNTARY.

Accounting: Fraud: Interest: Reimbursement. Where the entire transaction by which defendant built a house on plaintiff's lot and obtained and foreclosed a deed of trust thereon, was fraudulent and void, defendant is a mere volunteer as to the payment of repairs, insurance, taxes, water taxes and rents collected, and without standing in a court of equity to claim that he be reimbursed for the sums so paid or to interest on the sum named in the deed of trust. *Campbell v. Boyers*, 421.

PLEADING.

1. **Quo Warranto: Motion for Judgment on Pleadings: Things Admitted and Considered.** In *quo warranto*, submitted on a motion for judgment on the pleadings, consisting of the information and return, the court, in arriving at the substantive facts pleaded and proper for consideration upon the motion, takes as true the material allegations in the information admitted by the return, and also as true the material allegations in the return, thereby leaving open for discussion the legal conclusions of either party. *State ex inf. v. Railroad*, 1.
2. **Combination: Established by Pleading.** The mere allegation that a combination exists between two railroad companies is not sufficient to establish such combination. *Ib.*
3. ———: ———: **Control by Ownership of Stock.** One railroad company cannot in law be said to control another where its ownership of the other's stock, if exercised, can amount to no more than the election of two of its thirteen directors. Nor can a charge of a control and combination deduced from such ownership be considered other than a conclusion of the pleader. Nor does the fact of such percentage of ownership support the conclusion, either of control or ownership. *Ib.*
4. **Petition: Estoppel.** When a petition states such improper acts upon the part of defendant as will defer the running of the Statute of Limitations in his favor, a further plea that he is estopped to plead the statute is useless. *Sonnenfeld v. Millinery Co.*, 309.
5. **Demurrer: Waived by Thereafter Offering Evidence.** Defendant's demurrer asked at the close of plaintiff's evidence is waived by offering evidence in support of its answer at the close of plaintiff's case and after its demurrer has been overruled. If at the close of all the evidence such demurrer is renewed, it will be considered on appeal, but will be viewed in the light of all the evidence in the case. *Cook v. Pulitzer Pub. Co.*, 326.
6. ———: **Libel: Practice Commended.** In libel and slander cases the practice is recognized and commended of challenging the sufficiency of plaintiff's case, as to the law and the evidence, by an instruction in the nature of a demurrer. *Ib.*
7. **Libel: Demurrer: No Express Imputation of Crime: Per Se Libelous.** The absence from the publication of an imputation of crime does not necessarily render the publication non-libelous *per se*. If it does impute crime it is libelous *per se*, and an instruction in the nature of a demurrer, so far as it challenges the sufficiency of the petition, is correctly refused. *Ib.*
8. ———: **Crime: Necessity for Innuendo.** If a publication directly imputes crime it is libelous *per se*, and in such case it is not necessary, in the statement of a cause of action, to plead any extrinsic facts as inducement or to add an innuendo as to its defamatory meaning. On the other hand, if the publication is libelous *per se* as imputing crime, but extrinsic facts are necessary to bring out the defamatory meaning, then the law requires the allegation of such facts as inducement, in order that the actionable character of the words may appear. *Ib.*

PLEADING—Continued.

9. ———: ———: No Imputation of Official Misconduct: Not Alleged to be Wilful or Malicious: Sufficiency of Petition in this Case. The plaintiff was Secretary of State, and as such officer had authority to examine banks and prevent insolvent banks from continuing in business. The Salmon Bank failed on June 20, 1905, after plaintiff had gone out of office in January, 1905, after a term of four years, and the petition charges that: "On June 28, 1905, in the edition of said newspaper bearing said date, in the editorial columns thereof, the defendant corporation (having reference to said Salmon Bank and plaintiff's connection therewith) did wrongfully, wickedly and with malice publish of and concerning plaintiff the following false, libelous and defamatory words and matter, to-wit: 'Is It a Political Junkshop? The special correspondent of the Post-Dispatch states upon authority of those having examined the Salmon Bank, that the bank has been insolvent since November, 1903. Why was not the bank closed at that time? Why was it permitted to keep its doors open and receive the deposits of a confiding public? Major Harvey Salmon [meaning one of the owners and proprietors of said Salmon Bank] was a member of the Democratic Central Committee, and the intimate political friend of the machine leaders of the Democratic party [meaning the political party with which plaintiff was allied and to which he owed his nomination and election to said office of Secretary of State]. The bank's books were examined just before Ex-Secretary of State Cook [meaning plaintiff] went out of office, but no action was taken and the bank was left open to take the money of unsuspecting depositors. Is the damaging derelict a part of the political junk of the old Democratic State Machine [insinuating and meaning thereby that the plaintiff herein while Secretary of State and while administering the duties of said office was guilty of wilful and malicious partiality, neglect and misconduct in his official capacity and of favoritism and violation of official duty, and was actuated by personal, political and other improper motives in the matter of the examination and supervision of said Salmon Bank, whereby said bank was permitted to carry on its business after it had become insolvent, and that in consequence thereof its depositors were misled and deceived and suffered financial loss and injury].' That defendant corporation in the manner and by the means aforesaid did falsely, maliciously and wickedly print, publish, circulate and give currency to the charge that plaintiff while administering the office of Secretary of State (said office being one of public trust as hereinbefore stated) was guilty of partiality, favoritism, official misconduct, violation of official duty, and was actuated by improper motives in relation to the examination and supervision of said Salmon Bank, as hereinbefore more fully stated." The statute provides that "every person exercising or holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under cover of his office, shall, on conviction, be deemed guilty of a misdemeanor." Held, that the publication did not impute to plaintiff the commission of a crime, and the case should not have been submitted to the jury upon that hypothesis. The closing allegations of the petition, even if regarded as matters of inducement, do not allege generally that crime was imputed, nor that the partiality, favoritism or official conduct, as set forth, was wilful or malicious, and in the absence of such words of

PLEADING—Continued.

intent the misconduct alleged cannot be construed as imputing crime within the meaning of the law. *Cook v. Pulitzer Pub. Co.*, 326.

10. ———: **Sufficient, Nevertheless: Official Misconduct.** But while the said publication does not charge or impute crime to plaintiff, nor that he was actuated by corrupt motives, it does impute such official misconduct to him as brings it within the statutory definition of libel, and if the facts were false a good cause of action is stated in the petition. *Ib.*
11. ———: **Inducement: Place in Petition.** Matter of inducement should precede the libel and innuendo in the petition. The usual order of pleading is to set it out as prefatory allegations. *Ib.*
12. ———: **Innuendo: Stating Defamatory Meaning in: Inducement Necessary.** Where the defamatory meaning does not appear on the face of the article complained of, but depends upon extrinsic facts, it is not sufficient that such defamatory meaning be alleged in the innuendo only. The want of proper inducement cannot be supplied by innuendo. Words not themselves actionable, cannot be rendered so by innuendo, without a prefatory averment of extrinsic facts which makes them libelous. *Ib.*
13. ———: **Demurrer: Pleading Sufficient: Facts Insufficient: Comment: Privilege.** The publication in this case, charges that plaintiff, as Secretary of State, having in charge the examination and supervision of banks, was neglectful of official duty and protected an insolvent bank out of political and personal friendship for one of its proprietors, and the petition sufficiently states a cause of action for libel as libel is defined in the statute; but the evidence is reviewed, and the facts stated in the publication being admitted to be true, the comment thereon was not libelous, and the demurrer to the evidence offered at the close of the case should have been sustained. *Ib.*
14. **Insufficient: Objection First on Appeal.** It would be unfair to treat as fatal an objection, made for the first time in the appellate court, to the form of an answer, which objection could have easily been met by an amendment in the trial court. *Williams v. Keef*, 366.
15. **Departure: Abandoned Petition Not Preserved.** Whether or not the amended petition was a departure from the original petition cannot be considered on appeal, unless the original petition is made a part of the record as a matter of exception. *Mugan v. Wheeler*, 376.
16. **Trust Estate: Absolute Deed: Proof.** A petition alleging that the owner of land conveyed it in trust, to be held by the grantee for the grantor, and that thereafter, at the grantor's request, the said grantee conveyed it in trust to defendant to be held by her for the use of said grantor and his heirs, states a cause of action, without allegation that such trust was evidenced by some writing. That it was not created by a writing is a matter of defense, or is to be raised by objection to the evidence offered to prove the trust. *Mugan v. Wheeler*, 376.

PLEADING—Continued.

17. **Departure: Amended Petition: Original Abandoned: Matter of Exception.** When an amended petition is filed by leave of court, the original petition is abandoned and thereafter can be made a part of the record only as a matter of exception, and if not made a part of the record by exception only the amended petition is before the court on appeal, and the question of whether the amended petition was a departure from the original cause of action is not for consideration. *Campbell v. Boyers*, 421.
18. **Amended Petition: Motion to Strike Out: Overruled: No Exception.** If plaintiff files an amended petition and thereupon defendant files a motion to strike it out, and that motion is overruled, to which no exception is saved, and thereafter defendant appears and testifies before the referee, his answer to the original petition, which remained on file and was not withdrawn, must be considered a pleading on file and responsive to the amended petition. *Ib.*
19. **Probate Judge: Motion to Practice Law.** Where no charges are preferred against the attorney, and he voluntarily files a motion in a case pending in the circuit court, asking permission to represent his clients therein, and that motion is denied on the ground that he is probate judge and the act of March 27, 1911, prohibits the probate judge of a county having fifty thousand inhabitants from practicing law, there is no proceeding pending to disbar him, nor could he be disbarred upon any such motion, nor is the validity of the statute prohibiting the probate judge in such a county from practicing law thereby brought before the circuit court for determination, nor is it for determination in the Supreme Court when he brings a mandamus suit to compel the circuit court to permit him to practice, basing his suit upon the alleged invalidity of that statute, nor can he in that way have its invalidity determined because he fears he may suffer the penalties of the statute if he continues to practice law in violation thereof. *State ex rel. v. McElhinney*, 592.
20. **Motions: Appeals: Attorneys: Right to Practice.** Motions are not original and independent proceedings, such as are required to be brought against an attorney at law to revoke his license. They are only incidental steps taken in all classes of cases pending, and the rulings of the court thereon are not judgments, but merely orders from which there is no appeal, unless authorized by an express statute. But a judgment disbarring an attorney is final and an appeal will lie therefrom. *Ib.*
21. **Libel: Colloquium: Connecting Plaintiff with Publication.** If the publication is libelous *per se*, there need be, under the statute, no colloquium of extraneous facts for the purpose of showing the application of the defamatory matter to the plaintiff more than that the words were spoken or published of or concerning him. That allegation having been made, the petition need not allege that the plaintiff was either owner, lessee, operator or managing officer of the corporation conducting, permitting and encouraging the bookmaking and pool selling charged to be a felony. And to charge that "these men are engaged in the com-

PLEADING—Continued.

mission of a felony and the owners of the race track are equally guilty with the bookmakers under the statute," is to charge a libel *per se*. *Tilles v. Publishing Co.*, 609.

PRACTICE.

1. **Quo Warranto: Motion for Judgment on Pleadings: Things Admitted and Considered.** In *quo warranto*, submitted on a motion for judgment on the pleadings, consisting of the information and return, the court, in arriving at the substantive facts pleaded and proper for consideration upon the motion, takes as true the material allegations in the information admitted by the return, and also as true the material allegations in the return, thereby leaving open for discussion the legal conclusions of either party. *State ex inf. v. Railroad*, 1.
2. **Receivers: Distribution of Proceeds: No Objection to Order Until After Appeal.** Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiffs may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands, and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree. *Trendley v. Railroad*, 73.
3. **Appeal: Agreed Statement: Matter of Exception.** Agreed statements of facts, in cases instituted by petitions, are mere matters of evidence, and do not become a part of the record unless incorporated in a bill of exceptions. *Fruin v. O'Malley*, 250.
4. ———: **Exceptions: Separate Finding of Facts.** Under the statute (Sec. 1972, R. S. 1909) both the special findings of facts and conclusions of law should be entirely separate from the judgment, in order that the party excepting to such finding may except to the "decision of the court on the conclusions of law or equity arising in the case," which means that such exceptions to the court's conclusions of law shall be saved as may be properly included in a bill of exceptions. The law does not contemplate that exceptions shall be written into the record proper. *Ib.*
5. ———: ———: **No Bill of Exceptions.** In an action at law, where there was a special finding of facts, which is not made a part of the judgment, and no bill of exceptions was filed, there is nothing for review on appeal but the record proper, and a separate finding of facts is not a part of the record proper; and if the judgment is legally sufficient within itself, and the petition legally sufficient to support the judgment, that judgment will be affirmed. But if there is an error on the face of the judgment, that error will be corrected. *Ib.*

PRACTICE—Continued.

6. **Order Granting New Trial: Not Preserved: Appellate Practice.** Where the order granting to defendants a new trial is not set out in the record, the presumption will be indulged, on appeal, in favor of the court's action, and it will be upheld if sustainable upon any of the grounds of the motion for a new trial. *Peper v. Peper*, 260.
7. ———: **Appellate Practice: Sustained by Substantial Evidence.** Where under the facts and circumstances in evidence it cannot be said that there was no substantial evidence against the finding and decree of the court, the appellate court will not hold that the trial court erred in granting to defendants one new trial, where in their motion therefor they aver that the judgment is contrary to the evidence and that there is no evidence to support the judgment quieting the title in plaintiff. *Ib.*
8. ———: ———: **Judgment on Merits.** But where the appellate court has reached the conclusion that the trial court did not err in granting to defendants one new trial, it will not go further and review the case on the merits and direct the trial court to set aside the order granting a new trial and render judgment for defendants. There is no final judgment after the order granting a new trial was entered, and the appellate court's duty, on an appeal from that order, is to review only the court's action in granting the new trial. *Ib.*
9. **Exceptions: Jury: Omission to Swear a Member: Appeal.** The omission to swear a member of the jury in a civil case is but matter of exception. *Ross v. Grand Pants Co.*, 296.
10. ———: ———: ———: ———: **Constitutional Question.** There is a conflict in testimony as to whether a member of the jury in a civil case was sworn. Counsel for appellant was present during all the time in point, and yet saved no exception. He now attempts to raise a constitutional question under the provision regarding trial by jury. *Held*, that even if a constitutional question is involved (a matter not discussed), yet, since timely exception was not saved, the Supreme Court cannot decide the point. A constitutional question in order to confer jurisdiction in a given case must not only be raised below, but must be raised at the proper time and kept alive. *Ib.*
11. **Suit to Quiet Title: Defense of Limitations: Action at Law: Appeal: Statement.** An action under Sec. 2535, R. S. 1909, to quiet title, and for ejectment, to which is pleaded the defense of limitations, is an action at law, and the Supreme Court will not usurp the duty of the trial court, sitting as a jury, to weigh the evidence. The appellate court's statement of the case means simply that there was some evidence of the facts stated. *Slicer v. Owens*, 319.
12. **Demurrer: Waived by Thereafter Offering Evidence.** Defendant's demurrer asked at the close of plaintiff's evidence is waived by offering evidence in support of its answer at the close of plaintiff's case and after its demurrer has been overruled. If at the close of all the evidence such demurrer is renewed, it will be considered on appeal, but will be viewed in the light of all the evidence in the case. *Cook v. Pulitzer Pub. Co.*, 326.

PRACTICE—Continued.

13. ———: **Libel: Practice Commended.** In libel and slander cases the practice is recognized and commended of challenging the sufficiency of plaintiff's case, as to the law and the evidence, by an instruction in the nature of a demurrer. *Ib.*
14. **Libel: Demurrer: No Express Imputation of Crime: Per Se Libelous.** The absence from the publication of an imputation of crime does not necessarily render the publication non-libelous *per se*. If it does impute crime it is libelous *per se*, and an instruction in the nature of a demurrer, so far as it challenges the sufficiency of the petition, is correctly refused. *Ib.*
15. ———: **Demurrer: Pleading Sufficient: Facts Insufficient: Comment: Privilege.** The publication in this case, charges that plaintiff, as Secretary of State, having in charge the examination and supervision of banks, was neglectful of official duty and protected an insolvent bank out of political and personal friendship for one of its proprietors, and the petition sufficiently states a cause of action for libel as libel is defined in the statute; but the evidence is reviewed, and the facts stated in the publication being admitted to be true, the comment thereon was not libelous, and the demurrer to the evidence offered at the close of the case should have been sustained. *Ib.*
16. ———: **Comment: Privilege: Overcome by Proof of Falsity or Malice.** The burden is not on the plaintiff, in order to make out a *prima facie* case of libel, to prove that the facts stated in the publication were false, or that defendant was actuated by express malice in the comments he made thereon. The true rule is that, when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded, either by proof that the publisher was inspired by actual malice, or that the facts published and commented upon were false; if he fail to prove the one or the other, a *prima facie* case will not be made out, and the court should sustain a demurrer to the evidence. *Ib.*
17. **Malicious Prosecution: Duty of Court and Jury.** When the facts in an action for malicious prosecution are undisputed, it is the duty of the court to declare their legal effect; when they are disputed, it is for the jury to determine the question under proper instructions. *Hanna v. Insurance Co.*, 383.
18. ———: **Reasonable Doubt: Evidence.** In no case can an action for malicious prosecution be sustained where there was probable cause. *Held*, that in this case there was probable cause. *Ib.*
19. **Libel: Qualified Privilege: Question for Jury.** If the publication was qualifiedly privileged and the record rebuts the idea of malice, there is no case for the jury. And though the words attributed to the Attorney-General are of themselves libelous *per se* and though malice is presumed where the words are *per se* actionable, yet if the publication truthfully published the words used by him, who uttered them in his official capacity as information to the public, concerning a matter of great public concern, there is no question for the jury, in the absence of any showing of actual malice; and if there was no showing of express malice and none was found

PRACTICE—Continued.

by the jury, although they returned a verdict for compensatory but none for punitive damages, the judgment must be reversed.

Held, by WOODSON, J., dissenting, that the court cannot declare the interview of the Attorney-General was in fact his official opinion; that whether or not it was an official opinion was a fact to be determined by the jury, upon the evidence introduced, and not by him; and that, until that fact was established, the opinion, which was oral, was not admissible in evidence. *Tilles v. Publishing Co.*, 609.

20. **Bill of Exceptions: Lost: Substitution.** The purported bill of exceptions substituted in lieu of the original which has been lost or destroyed, should be something more than calls for the oral testimony of witnesses. It should at least contain their names, and the substance of their testimony. *Graves v. Chapman*, 650.
21. ———: ———: ———: **Copy: Legal Conclusion.** A statement by counsel that because the original bill of exceptions and the stenographer's notes were lost or destroyed he has been unable to supply a copy thereof, is simply the statement of a legal conclusion and not of the facts by which the court could determine whether such copy could be reproduced. Appellant should make an honest effort to supply a substantial copy of the lost bill or the substance of the testimony. *Ib.*
22. ———: ———: **New Trial: Negligence of Counsel and Clerk.** Respondent should not be penalized by another trial and its uncertainty, because of the negligence and carelessness of counsel for appellant, or the misconduct of the clerk in permitting counsel for other defendants to remove the bill of exceptions from his office and to retain them for years without inquiry as to their safety or whereabouts. *Ib.*
23. ———: ———: ———: **Deceased and Scattered Witnesses.** It would be unjust to respondent to grant appellant a new trial after the witnesses are scattered or dead, simply because the bill of exceptions, through no fault of respondent, has been lost or destroyed. *Ib.*
24. ———: ———: ———: **Statu Quo.** A new trial because of a loss of the original bill of exceptions should not be granted where the parties at a new trial would not be in *statu quo*, and where appellant permitted three years to elapse after the bill was lost or destroyed without making any effort to supply it. *Ib.*
25. **Collateral Attack: Ejectment.** The defendant in an action of ejectment, to which she has answered by a general denial, has the right to defend her possession, and when plaintiff offers proof of his title to object to it for infirmities apparent on its face. Defendant in such case does not seek to have annulled the sheriff's deed under which plaintiff claims, made in the foreclosure of a school fund mortgage without an order of court, nor does she make a collateral attack upon that deed, but she simply requires plaintiff to make legal proof of his title. *Neill v. Tubb*, 666.

PRECEDENT. See *Stare Decisis*.

PRINCIPAL AND AGENT.

1. **CONTRACT: Fiduciary Relation: Insurance Company.** A general agent for an insurance company made a contract with the company by the terms of which all funds received by the agent were trust funds, not to be used by the agent, but to be remitted to the company. *Held*, that the relation thus formed was a fiduciary one, which was not altered in practice by the fact that when the agent settled with the company under his previous contract containing the same terms, he failed to account for certain first-premium notes and the company allowed him special favors in order to pay for those notes, and that an official of the company soon after the making of the last contract directed the agent to cash all premium notes at once—and this view is strengthened by the fact that after the last contract was made the company wrote the agent a letter calling his attention to the fiduciary clause, censuring him for selling a premium note and failing to reimburse the maker when rejected, and warning him that his conduct was an unlawful conversion of another's property. *Hanna v. Insurance Co.*, 383.
2. **Insurance: Authority to Sell Premium Notes.** Authority to a general insurance agent to sell premium notes is not permission to convert the proceeds to the agent's own use. *Ib.*
3. **Embezzlement: Trust Fund: Failure to Account: Evidence.** The statute defining embezzlement does not make the failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund. The failure to account may, however, be material evidence tending to establish the act of conversion. *Ib.*
4. ———: **Definition.** Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. *Ib.*
5. ———: **Proof Covering Part Only of Sum Charged.** The general agent for an insurance company was prosecuted for embezzling three first-premium notes. He took these notes payable to himself, immediately cashed them, paid the sub-agents their commissions and, in violation of his contract with the company making all funds in his hands fiduciary, converted the remainder to his own use. When the applications with which the three premium notes were taken, were rejected, the sub-agents refunded to the general agent. The agent asserted upon the trial that before this refunding by the sub-agents he had made a claim against the company for reimbursement for sums advanced on account for sub-agents in other transactions and that therefore the money so refunded to him could be retained and he could not be guilty of embezzlement because the whole amount charged had not been converted. *Held*, that a prosecution for the embezzlement of a certain sum can be sustained by showing the embezzlement of any portion of that sum. *Ib.*
6. ———: **When Offense is Completed: Efforts to Atone.** The offense of embezzlement is complete at the time of conversion and is not tolled by subsequent claims or efforts at atonement. *Ib.*

PRINCIPAL AND AGENT—Continued.

7. ———: Conversion: Evidence: Criminal Intent. Where in a prosecution for embezzlement the admitted facts show a conversion of part of the items charged before any counterclaim was made or entertained by the defendant, such conversion is a fact from which the jury would be authorized to infer a criminal intent. *Hanna v. Insurance Co.*, 383.

PROBATE JUDGE, RIGHT TO PRACTICE LAW. See Attorneys.

QUIETING TITLE.

Defense of Limitations: Action at Law: Appeal: Statement. An action under Sec. 2535, R. S. 1909, to quiet title, and for ejectment, to which is pleaded the defense of limitations, is an action at law, and the Supreme Court will not usurp the duty of the trial court, sitting as a jury, to weigh the evidence. The appellate court's statement of the case means simply that there was some evidence of the facts stated. *Slicer v. Owens*, 319.

QUO WARRANTO.

1. Motion for Judgment on Pleadings: Things Admitted and Considered. In *quo warranto*, submitted on a motion for judgment on the pleadings, consisting of the information and return, the court, in arriving at the substantive facts pleaded and proper for consideration upon the motion, takes as true the material allegations in the information admitted by the return, and also as true the material allegations in the return, thereby leaving open for discussion the legal conclusions of either party. *State ex inf. v. Railroad*, 1.
2. Combination: Established by Pleading. The mere allegation that a combination exists between two railroad companies is not sufficient to establish such combination. *Ib.*
3. ———: ———: Control by Ownership of Stock. One railroad company cannot in law be said to control another where its ownership of the other's stock, if exercised, can amount to no more than the election of two of its thirteen directors. Nor can a charge of a control and combination deduced from such ownership be considered other than a conclusion of the pleader. Nor does the fact of such percentage of ownership support the conclusion, either of control or ownership. *Ib.*
4. Railroads: Ownership of Stock: Connecting Lines. The ownership of the stock of one railroad company by another connecting line does not violate the law. *Ib.*
5. ———: Ownership of Express and Refrigerator Companies. A railroad company may own the stock of an express company organized as a carrier of express freight, and also the stock of a refrigerator car company which owns cars devised and used for the transportation of products which require refrigeration while in transit. The railroad company could engage in such express and refrigerator transportation business itself, and what it may do directly it can do indirectly by owning the stock of the companies engaged directly in the business. But under the law, it is the duty of the railroad company to permit any express company to operate upon its lines. *Ib.*

QUO WARRANTO—Continued.

6. ———: **Combination: Stockholders in Several Defendant Companies: Not Before Court.** An allegation in the information that certain stockholders own a majority of the stock of one of the respondent railroad companies, which in turn owns some of the stock of the other two railroad companies and of the express company and the refrigerator car company, and that such stockholders have conspired together to control all the respondents, will not justify a writ of ouster against the respondent companies, where such individual stockholders are not made parties, and therefore are not before the court. *Ib.*

RAILROADS.

1. **Ownership of Stock: Connecting Lines.** The ownership of the stock of one railroad company by another connecting line does not violate the law. *State ex inf. v. Railroad, 1.*
2. **Ownership of Express and Refrigerator Companies.** A railroad company may own the stock of an express company organized as a carrier of express freight, and also the stock of a refrigerator car company which owns cars devised and used for the transportation of products which require refrigeration while in transit. The railroad company could engage in such express and refrigerator transportation business itself, and what it may do directly it can do indirectly by owning the stock of the companies engaged directly in the business. But under the law, it is the duty of the railroad company to permit any express company to operate upon its lines. *Ib.*
3. **Combination: Stockholders in Several Defendant Companies: Not Before Court.** An allegation in the information that certain stockholders own a majority of the stock of one of the respondent railroad companies, which in turn owns some of the stock of the other two railroad companies and of the express company and the refrigerator car company, and that such stockholders have conspired together to control all the respondents, will not justify a writ of ouster against the respondent companies, where such individual stockholders are not made parties, and therefore are not before the court. *Ib.*

RECEIPT. See **Fraud.**

RECEIVERS.

Distribution of Proceeds: No Objection to Order Until After Appeal. Where plaintiffs did not object to the failure of the final decree discharging the receivers to order that they be reimbursed for money advanced to the corporation until after their motion for a new trial had been overruled and the appeal taken, they cannot on appeal object to the decree on that account. Where the receiver's report in all respects complies with the decree, and an appeal has been taken from that decree, any subsequent motions plaintiffs may file in the case are not for review and cannot be incorporated in the bill of exceptions. In such case the appeal is from the decree as it stands, and new matters subsequently brought into the case are not for consideration in determining whether appellants have been aggrieved by that decree. *Trendley v. Railroad, 73.*

REFERENCE AND REFEREES.

1. **Referee's Report: Exceptions: Equity.** Alleged errors growing out of a reference are matters of exception and can only be reviewed when incorporated in a bill of exceptions. Besides, in an equity case a referee's report, like the verdict of a jury, is only advisory, and not binding upon the court. *Campbell v. Boyers*, 421.
2. ———: **Not Made a Ground for New Trial.** The disposition made of the referee's report is not for consideration on appeal unless the court's action in reference thereto is made a ground in the motion for a new trial. *Ib.*
3. ———: **Ruling Excepted to Set Aside.** An appellant cannot be heard in the appellate court to complain of a ruling of the trial court against him which was afterwards set aside. Where the decree and ruling of the trial court upon the referee's report, to which appellant objected and filed his term bill of exceptions, was at the same term of court set aside and for naught held, appellant cannot be heard to urge his objection to that report. *Ib.*

REMARKS OF COUNSEL. See Attorneys.

REPRESENTATION OF INSOLVENCY. See Fraud.

RES ADJUDICATA.

1. **Former Decisions: Authority: Limited to Facts.** The language used in any opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case. General language is not to be disconnected from those facts and issues and applied mechanically or automatically to the different facts and issues of another case. The reasoning, illustrations and references contained in an opinion are not authority or precedent, but only the points arising in the particular case and which were decided by the court are. *State ex rel. v. St. Louis*, 231.
2. ———: **Void Proviso: Decision Limited to That: Museum of Fine Arts: Taxation.** The case of *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47, was directed to holding invalid the proviso in section 3 of the Act of 1907, which turned over to a self-perpetuating board of an auxiliary branch of Washington University the tax authorized by the act to be levied and collected, and was not meant to hold and did not hold that the whole act was void, if the administrative board to manage the fund was appointed by the mayor in the manner provided by the words of that section preceding that proviso. It was not held in that case that the act was passed for the mere purposes of the proviso, that is, that the tax was to be levied and collected for the use of the board of control of the St. Louis School of Fine Arts, which was an auxiliary assistant to the board of Washington University. The effect of that decision was that the taxes so collected could not be turned over to that board of control, which was the relator, suing for the fund in that case. The case is *stare decisis* only to the point of holding the proviso unconstitutional. The rest of the act was not held in judgment in that case. *Ib.*

RES ADJUDICATA—Continued.

3. **Majority Opinion.** When the Supreme Court by a majority of its judges has spoken, its decision is the judgment of the court. *Tilles v. Publishing Co.*, 609.

RESULTING TRUST. See *Trusts and Trustees.*RIGHT TO PRACTICE LAW. See *Attorneys.*

ROAD FUNDS.

1. **Distribution: Motor Tax.** The Act of 1911 requires the taxes arising from licenses upon motor vehicles to be placed in the "General State Road Fund." *Gasconade County v. Gordon*, 569.
2. **Statutes: Enacted at Same Session: In Pari Materia: Construction.** Statutes enacted at the same session of the Legislature, by the same minds acting upon the same subject, are *in pari materia*; and in such case the courts construe all the acts in such manner that each and every part thereof may stand, if such construction can be attained without doing violence to the language used in them. But if they are clearly inconsistent and repugnant, the later of the two acts prevails, and the earlier one falls. *Ib.*
3. ———: **Stamp Act: General State Road Fund Act.** The Stamp Act and the General State Road Fund Act are not repugnant and inconsistent, and both can stand, though both relate to the application of State road funds. The Stamp Act fund goes to all counties, is apportioned as school funds are, and can be used by the counties for any legitimate road purposes. The "General State Road Fund" can be used in the construction of permanent roads and for no other purpose, and the act defines such roads to be those constructed of rock and gravel, a "sandy-clay," etc., and says the plans must be approved by the county court and State Highway Engineer, and requires the fund to be distributed among the counties in proportion to the assessed valuation of properties therein. The two acts supplement each other. *Ib.*
4. ———: ———: ———: **Legislative Interpretation.** The Legislature has uniformly, by appropriation acts and otherwise, recognized that the Stamp Act Fund and the General State Road Fund are distinct funds; and the courts cannot by way of judicial legislation do what the Legislature has not done. Without further legislation the Stamp Act fund cannot be placed by the State Auditor and State Treasurer in the General State Road Fund. *Ib.*
5. ———: ———: **General State Road Fund: Distribution.** The whole of the General State Road Fund for a given year cannot be distributed among the various counties unless all have constructed the permanent roads called for by the act. The act means that no money can be distributed until (1) an approved requisition has been made by a county, and (2) then only in proportion to the assessed valuation of property in the county, and (3) in no case can a county have more than three per cent of the whole fund. All the money remaining, after the counties complying with the act have drawn out their statutory share, at the end of two years is subject to a new aggregation and distribution. *Ib.*

ST. LOUIS CITY AND ST. LOUIS COUNTY. See Courts.

SATISFACTION.

Tender or Payment of Part of Unquestioned Sum Due: Accord and Satisfaction. The payment or tender, under a policy of insurance, of a sum less than the full amount of the unquestioned sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount due. *Head v. Insurance Co.*, 403.

SCHOOL FUND MORTGAGE. See Mortgages and Deeds of Trust.

SENATORIAL DISTRICTS.

1. **Division of State Into: Legislative In Character: State Officers Legislative Body.** The districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority; and the Governor, Secretary of State and Attorney-General, when assembled in obedience to the Constitution to divide the State into senatorial districts, after the failure of the General Assembly to do so, become a legislative body, and their acts in that behalf are the exercise of a legislative function. They cannot, therefore, be compelled by mandamus to divide the State into senatorial districts. *State ex rel. v. Hitchcock*, 433.
2. ———: **By State Officers: Three Essentials.** After a division of the State into senatorial districts has been agreed upon by the Governor, Secretary of State and Attorney-General, and reduced to writing, the Constitution requires three other things to be done before the "statement" shall become effective, namely: first, the members of the body must sign the statement; second, it must be authenticated by the Great Seal of the State and filed in the office of the Secretary of State; and, third, proclamation thereof must be made by the Governor. *Ib.*
3. ———: ———: **Signed by Quorum.** A majority of the three officers authorized by the Constitution to divide the State into senatorial districts, when legally assembled, constitute a quorum to transact business, and a "statement" signed by two of them is legally signed by "the members" within the meaning of the requirement of the Constitution. *Ib.*
4. ———: ———: **Promulgation by Governor: Directory Requirement.** The words of the Constitution declaring that "upon the proclamation of the Governor" a division of the State into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be binding and effective as if done by the General Assembly," is mandatory, and not merely directory. This court is firmly wedded to the doctrine that constitutional requirements are mandatory rather than directory. It will not undertake to amend the Constitution by whittling it away piecemeal. *Ib.*
5. ———: ———: **Conforms to Other Legislative Requirements.** The said constitutional provision conforms to the general idea that all forms of legislation are supposed to meet with the Governor's approval. *Ib.*
6. ———: ———: ———: **Meaning of the Word Upon.** The word "upon" used in the constitutional provision declaring that "upon the proclamation of the Governor" a division of the State

SENATORIAL DISTRICTS—Continued.

into senatorial districts made by the Governor, Secretary of State and Attorney-General "shall be as binding and effective as if done by the General Assembly," means that the statement or division shall become effective "upon the occasion of," "following upon," "because of," "by reason of," "after and in consequence of" the Governor's proclamation; and that in effect is stating that it shall not become effective until proclamation thereof is made by him. *Ib.*

7. ———: ———: ———: **Presumption that Proclamation was Made.** The language of the Constitution implies an actual proclamation by the Governor—not one by the Attorney-General and Secretary of State. Because the Secretary of State and Attorney-General made up a statement dividing the State into senatorial districts, signed it, and the Great Seal of the State was attached thereto and it was filed in the office of the Secretary of State, as the constitutional provision requires, it will not be presumed that proclamation thereof was made, or that the legal effect was the same as if proclamation had been actually made, in the face of the fact that the Governor did not sign the statement, did not concur in anything that was done, and has persistently refused to make public proclamation of what was done. *Ib.*
8. ———: **Discretionary and Non-Discretionary Powers: Compact: Contiguous, etc.** In the division of the State into senatorial districts the Legislature, or the officers authorized to act upon its failure to act, has no discretion as to three important matters: 1st, as to the number of districts, for there must be thirty-four; 2nd, when a district is to be composed of more than one county, they must be contiguous; and, 3rd when a district is composed of more than one county, no county shall be divided. The Legislature may exercise a discretion in two matters: 1st, each district is to be made as nearly equal in population as practical, and, 2nd, when a district is to be composed of more than two counties, it shall be as compact as it may reasonably be made; but even that discretion is limited. *Ib.*
9. ———: **Abuse of Discretion: Unequal Population.** Where the population of the State is 3,293,336 and the number of senatorial districts is thirty-four, making the ratio 96,862, and the Constitution requires the population of each district to be "as nearly equal as may be," an apportionment that gives to the city of St. Louis, having a population of 687,029, only six senators, thereby leaving 105,867 persons unrepresented, is an abuse of the legislative limited discretion, and is null and void. But the apportionment of three senators to Jackson county, which had a population of 283,522, was not an abuse of that discretion, for, since no county can be divided, to give it only two would leave a surplus population of 89,798. *Ib.*
10. ———: ———: **Compactness.** Variation in population of the districts, even to the amount of several thousand, will not alone render the apportionment invalid. But where the constitutional requirements both as to equality of population and compactness of territory have not been observed, it is invalid. The counties must be contiguous and as compact as the nature of the work will reasonably permit. *Ib.*
11. ———: **Circuit Court: Action Coerced by Mandamus.** The power vested by the Constitution in the circuit court of the

SENATORIAL DISTRICTS—Continued.

city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or on its failure to divide the State, by the three State officers, is legislative in character, and if that court refuses to exercise that power the Supreme Court cannot by mandamus compel it to act, any more than it can compel the General Assembly to act. *State ex rel. v. Hitchcock*, 433.

12. ———: By State Officers: Coerced by Mandamus. *Held*, by VALLIANT, C. J., that the power imposed upon the Governor, Secretary of State and Attorney-General, upon the failure of the General Assembly to divide the State into senatorial districts, "to perform said duty," is legislative in character; and the courts have no power by mandamus to compel them to perform said duty, or to review their act when performed, or to pronounce it a compliance with or a violation of the mandates of the Constitution stating how said districts shall be constituted. The provisions which specifically forbid the exercise or attempted exercise by one department of the government of powers devolved upon another impede any attempt by the court to compel legislative action. The Supreme Court has no jurisdiction by a mandamus suit to compel the circuit court of the city of St. Louis to divide the city into as many districts as the State officers have apportioned to that city, or to determine the validity of the division of the State into senatorial districts made by these officers. *Ib.*
13. ———: ———: Dividing City into Districts: Circuit Court Compelled by Mandamus: Jurisdiction. *Held*, by VALLIANT, C. J., that the provisions of the Constitution, declaring that "when any county shall be entitled to more than one senator, the circuit court shall cause such county to be divided into districts of compact and contiguous territory," etc., vest the circuit court with legislative power, and the Supreme Court cannot by writ of mandamus compel that court to perform that duty, nor does it have anything to do with the judges' reasons for refusing to do it. The circuit court in performing the duty does not act in a judicial capacity. No parties litigant, having personal rights to be adjudged or official duties to be directed, are required to appear, but the judges composing the circuit court come together of their own motion and perform a legislative function imposed upon them, finally and exclusively, by the Constitution. The Supreme Court has no jurisdiction to compel the circuit judges to divide the city into senatorial districts. *Ib.*
14. ———: ———: ———: ———: ———: Both Agreeing to Court's Jurisdiction. *Held*, by VALLIANT, C. J., that courts do not render judgments that will depend for satisfaction on the pleasure or complaisance of the parties against whom the judgment is rendered. Though all parties express a willingness to bow to the opinion rendered by the court, it cannot render judgment if it has no jurisdiction of the cause. *Ib.*
15. ———: ———: ———: ———: Obiter Dictum. *Held*, by GRAVES, J., that the constitutional power vested in the circuit court of the city of St. Louis to divide the city into as many senatorial districts as there have been apportioned senators to the city by the General Assembly, or by the three State officers, is purely a legislative function, and the Supreme Court cannot

SENATORIAL DISTRICTS—Continued.

compel the judges of that court to perform that duty, and has nothing to do with their reasons for refusing to perform it; and, as the majority opinion specifically holds that the Supreme Court, is on that account, without jurisdiction to compel the circuit judges to act, all of the majority opinion that discusses the validity of the apportionment as made by the three State officers, is *obiter dictum*, pure and simple, and binding on no one. *Ib.*

SETTLEMENT. See Fraud.

STAMP ACT FUND. See Road Funds.

STARE DECISIS.

1. **Former Decisions: Authority: Limited to Facts.** The language used in any opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case. General language is not to be disconnected from those facts and issues and applied mechanically or automatically to the different facts and issues of another case. The reasoning, illustrations and references contained in an opinion are not authority or precedent, but only the points arising in the particular case and which were decided by the court are. *State ex rel. v. St. Louis*, 231:
2. —: **Vold Proviso: Decision Limited to That: Museum of Fine Arts: Taxation.** The case of *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47, was directed to holding invalid the proviso in section 3 of the Act of 1907, which turned over to a self-perpetuating board of an auxiliary branch of Washington University the tax authorized by the act to be levied and collected, and was not meant to hold and did not hold that the whole act was void, if the administrative board to manage the fund was appointed by the mayor in the manner provided by the words of that section preceding that proviso. It was not held in that case that the act was passed for the mere purposes of the proviso, that is, that the tax was to be levied and collected for the use of the board of control of the St. Louis School of Fine Arts, which was an auxiliary, assistant to the board of Washington University. The effect of that decision was that the taxes so collected could not be turned over to that board of control, which was the relator, suing for the fund in that case. The case is *stare decisis* only to the point of holding the proviso unconstitutional. The rest of the act was not held in judgment in that case. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION.

1. **Statute: Amendment: Substitution: Intermediate Act: Insurance Company Capital.** When a section of a statute is amended or displaced by a later substituted act, and still later an act is enacted which in terms purports to amend the original repealed section, referring to it by section number, such intermediate amendment or substitute is to be regarded as if it had always been a part of, or in place of, the original section, and such last amendment of or substitute for the original act is valid. When Sec. 7957, R. S. 1899, was amended and displaced by the Act of 1901, which reduced the capital stock certain insurance companies must have to

STATUTES AND STATUTORY CONSTRUCTION—Continued.

\$100,000, and in 1909 an act was passed which in terms purports to amend Sec. 7957, R. S. 1899, by requiring such companies to have \$200,000 capital, and which does not refer to the Act of 1901, the Act of 1909 applies to the intermediate substitute of 1901, which is to be regarded as if it had always been a part of said section 7957. The Act of 1901 was amended by the Act of 1909, and this act by the Act of 1911, and the insurance companies embraced within its provisions are required to have a capital of \$200,000. *State ex rel. v. Blake*, 100.

2. **Constitutionality of Statute: Raised by Foreign Corporation.** A foreign corporation which has never been licensed to do business in this State has no right to challenge the constitutionality of a statute which denies to it the right to be admitted to this State. A corporation organized in one State cannot as a matter of right immigrate into another, and no other State is bound to receive it within its borders, and it can enter only upon such terms as the State may see fit to impose; and until it is admitted a statute which imposes onerous conditions or even impossible conditions upon its original admission violates no right of such foreign corporation, and it is only persons whose rights are invaded that can question the constitutionality of a statute. *Ib.*
3. **Unconstitutional Law: Invalid in Part: Presumption.** The presumption that where a law is unconstitutional in part the whole is invalid, is of doubtful existence. On the contrary, the court approaches the constitutionality of every law with a strong, even a violent, presumption that it is valid; and if the invalid part is separable from the rest, the presumption is that the rest is valid. *State ex rel. v. St. Louis*, 231.
4. ———: **Museum of Art Tax: Proviso Invalid: Rest Valid.** The Act of 1907, authorizing the city of St. Louis to levy and collect a one-fifth mill tax for a public art museum, and providing that when said act shall have been approved by a vote of the people the mayor, with the approval of the municipal assembly, shall appoint an administrative board of nine members to control the expenditure of the art museum fund, is this far constitutional; but the proviso, namely, that if there be already in such a legally constituted administrative board of public property devoted by law to the uses of an art museum (referring, as a matter of fact, to an existing board of control of an art museum which had become a part of Washington University), "such board and its successors shall be the board of control of the art museum," and have and expend the public tax, is invalid. But it cannot be said that the proviso furnished the whole legislative inducement for the act, and the invalid proviso being separable from the rest, and ancillary thereto, the rest is valid and constitutional; and it is the duty of the city, since the act has been approved by the people, to levy the tax, and of the mayor to appoint an administrative board. *Ib.*
5. ———: **Meaning Ascertained from Title.** The title of a law is of significance in getting at its intentment; and the consistency between the title and the main body of the act is important in determining whether the whole was made to depend on a proviso contained in a single section. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

6. ———: Vicious Intendment. In getting at and enforcing the intendment of the lawmaker the courts will not hold his intendment to be vicious or his law as amounting to nothing at all, unless driven thereto by imperative reasons *Ib.*
7. Instructions: In Felony Cases: Statute. The provision in Sec. 5231, R. S. 1909, requiring correct instructions to be given in a criminal case, "whether requested or not," that "a failure to so instruct in cases of felony shall be good cause, when defendant is found guilty, for setting aside the verdict of the jury and granting a new trial," distinguishes misdemeanors from felonies in the matter of non-direction. It has always been the rule that the failure to give necessary instructions in a misdemeanor case when requested, if exception is saved to such failure at the time, will work a reversal; and these words in the statute are entirely meaningless unless they mean that a failure to give necessary instructions in a felony case, whether requested or not, or whether or not an exception is saved to such failure, will work a reversal in a felony case. *State v. Conway*, 271.
8. Limitations: Deferred: "Improper Act:" Sec. 1905, R. S. 1909. The plaintiff's petition alleges, that the defendant corporation wrongfully got possession of its note payable to plaintiff and refused to allow plaintiff to see it; that the president of the corporation was plaintiff's brother, who convinced plaintiff that the note was signed by him instead of by his corporation; that plaintiff, thus deluded, sued her brother upon the note in 1902, in good time; and, finally, that while defendant corporation knew of the pendency of plaintiff's suit against her brother as maker of the note, it used all means to prevent her from learning the truth about the note until after the Statute of Limitations had run. *Held*, that the petition stated such improper acts on the part of defendant corporation as would defer the running of the Statute of Limitations in accordance with Sec. 1905, R. S. 1909. *Sonnenfeld v. Millinery Co.*, 309.
9. Insurance: Contract: Foreign Company: Compliance with Local Statutes. Foreign insurance companies admitted to do business in this State can only contract within the limits prescribed by the Statutes of Missouri. Under the license granted by the State they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." The statutes of this State governing the conduct of business by such foreign companies are declaratory of the public policy of the State, and inhibit the doing of the business of insurance in this State by any corporation contrary to their regulations, by annulling all the stipulations which offend the provisions of the statutes. *Head v. Insurance Co.*, 403.
10. ———: ———: Statutes Applicable to Non-Residents. The statutes of Missouri regulating the business of insurance were intended for the benefit and protection of all persons lawfully in the State and who obtained contracts of insurance there from a company licensed to make such contracts only in accordance with the laws of this State. These statutes are available for the protection of any such persons, though not citizens of Missouri, so contracting in this State. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

11. ———: Forfeiture: Extended Insurance. Under Sec. 6946, R. S. 1909, which provides for the application of a certain portion of the value of a policy to the purchase of extended insurance upon a failure to pay premiums, where a policy on which there had been a default had a sufficient value to extend it for its full amount beyond the death of the insured, and there was no waiver by the beneficiary of rights thereunder, a recovery of the full amount of the policy, less a loan made thereon, was warranted. *Head v. Insurance Co.*, 403
12. Road Funds: Distribution: Motor Tax. The Act of 1911 requires the taxes arising from licenses upon motor vehicles to be placed in the "General State Road Fund." *Gasconade County v. Gordon*, 569.
13. Statutes: Enacted at Same Session: In Pari Materia: Construction. Statutes enacted at the same session of the Legislature, by the same minds acting upon the same subject, are *in pari materia*; and in such case the courts construe all the acts in such manner that each and every part thereof may stand, if such construction can be attained without doing violence to the language used in them. But if they are clearly inconsistent and repugnant, the later of the two acts prevails, and the earlier one fails. *Ib.*
14. ———: Stamp Act: General State Road Fund Act. The Stamp Act and the General State Road Fund Act are not repugnant and inconsistent, and both can stand, though both relate to the application of State road funds. The Stamp Act fund goes to all counties, is apportioned as school funds are, and can be used by the counties for any legitimate road purposes. The "General State Road Fund" can be used in the construction of permanent roads and for no other purpose, and the act defines such roads to be those constructed of rock and gravel, a "sandy-clay," etc., and says the plans must be approved by the county court and State Highway Engineer, and requires the fund to be distributed among the counties in proportion to the assessed valuation of properties therein. The two acts supplement each other.. *Ib.*
15. ———: ———: ———: Legislative Interpretation. The Legislature has uniformly by appropriation acts and otherwise, recognized that the Stamp Act fund and the General State Road Fund are distinct funds; and the courts cannot by way of judicial legislation do what the Legislature has not done. Without further legislation the Stamp Act fund cannot be placed by the State Auditor and State Treasurer in the General State Road Fund. *Ib.*
16. ———: ———: General State Road Fund: Distribution. The whole of the general State Road Fund for a given year cannot be distributed among the various counties unless all have constructed the permanent roads called for by the act. The act means that no money can be distributed until (1) an approved requisition has been made by a county, and (2) then only in proportion to the assessed valuation of property in the county, and (3) in no case can a county have more than three per cent of the whole fund. All the money remaining, after the counties complying with the act have drawn out their statutory share, at the end of two years is subject to a new aggregation and distribution. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

17. **School Fund Mortgage: Statutes: Sec. 10817 and 10819: Construed Together.** Section 10817, Revised Statutes 1909, providing that a school fund mortgage shall contain a condition that if default be made in the payment of the principal or interest the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, without suit on the mortgage, proceed to sell the mortgaged premises, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a court of competent jurisdiction foreclosing the mortgage; and section 10819, Revised Statutes 1909, providing that when the principal secured by a mortgage containing a power of sale shall become due and payable the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same with costs upon the property conveyed by the mortgage, and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a *fiert facias* on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly, are to be construed together; and if the sheriff undertakes to sell the mortgaged property when no order of the county court directing him to sell was made, his act is null and void. *Neil v. Tubb*, 666.
18. ———: **Foreclosure and Sale by Sheriff: No Order of Court.** A sale by the sheriff of the mortgaged property, mortgaged to the county by a school fund mortgage, when no order of the county court directing him to sell has been made, as required by section 10819, Revised Statutes 1909, is null and void. *Ib.*
19. **Probate Court: Term: Alteration of Time.** Under the Laws of 1877, page 230, section 7, and the Revised Statutes of 1855, page 1601, section 9, the probate court of St. Louis county, at the June term, 1877, and on July 28th of that year, had express authority to make and enter of record an order changing the time for holding its stated terms, and to fix upon the second Monday in September and the first Mondays of December, March and June as the times for the beginning of the regular terms of the court. *Brown v. Marshall*, 707.
20. ———: ———: ———: **Before Act of 1877 Went into Effect.** Even if the order changing the times for the beginning of the terms of the probate court of St. Louis county, made on July 28, 1877, was made one day prior to the time the Act of 1877 went into effect, the Act of 1855 (R. S. 1855, p. 1601, sec. 9) was then in force, in almost the same words, and was ample authority for the order, since the Act of 1877 did not purport to repeal any of the Act of 1855 except "all acts and parts of acts inconsistent with this act," and there is nothing inconsistent between the two, and besides the Act of 1877 was but a continuation of the Act of 1855. *Ib.*
21. ———: ———: ———: ———: **Continuation of Existing Act.** A subsequent act repealing and re-enacting at the same time a pre-existing act is but a continuation of the latter, and the law dates from the passage of the first act and not from the date of the latter. *Ib.*
22. ———: ———: ———: **By Probate Court of County of Terms of City Court: Separation.** The separation of the

STATUTES AND STATUTORY CONSTRUCTION—Continued.

city of St. Louis from the county of St. Louis in 1876 did not affect the organization, jurisdiction or location of the probate court of St. Louis county then existing. The probate court of St. Louis county had authority at its July term, 1877, to change the time for beginning the regular terms of the probate court of St. Louis city. That was not an attempt by one court to make an order changing the terms of another court. Prior to the division of the county into the city and county of St. Louis, the county seat, courts, offices and public buildings of the county of St. Louis were in the city of St. Louis, and those courts continued and remained in the city after the segregation of the present county; and the change from the probate court of the county of St. Louis to the probate court of the city of St. Louis was a change only in name, with the single exception that, after the Act of April, 1877, creating a probate court for the segregated county of St. Louis, the territorial jurisdiction of the city court was *pro tanto* curtailed. In all other respects it continued with the same officers, the same habitat and the same jurisdiction. *Brown v. Marshall*, 707.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1909.

Section 519, see page 271.	Section 4818, see page 347.
520, see page 271.	5097, see page 278.
522, see page 271.	5231, see page 285.
951, see page 606.	5241, see page 278.
1546, see page 295.	5244, see page 284.
1831, see page 54.	5245, see page 289.
1837, see pages 346, 631.	6946, see page 413.
1841, see page 608.	7008, see pages 103, 104.
1842, see page 608.	8057, see page 737.
1882, see page 324.	10228, see page 577.
1889, see page 318.	10229, see pages 576, 577,
1905, see page 317.	586.
1968, see page 323.	10817, see page 674.
1971, see page 326.	10819, see page 674.
1972, see page 253.	11906, see page 577.
1973, see page 121.	11908, see page 580.
2535, see pages 321, 714.	11914, see pages 575, 576.
2868, see page 381.	11915, see pages 577, 578.
2983, see page 255.	11916, see pages 577, 578,
3037, see page 413.	584, 588.
3040, see page 413.	11917, see pages 577, 579,
3863, see page 270.	588, 589.
4061, see page 270.	11918, see pages 577, 580.
4411, see pages 342, 343.	

Art. 19, ch. 2, see pages 268, 270.

Art. 1, ch. 35, see page 270.

Ch. 91, see pages 575, 576.

Art. 4, ch. 121, see page 576.

Art. 5, ch. 121, see page 575.

Revised Statutes 1899.

Section 635, see page 631.	1026, see page 413.
650, see pages 261, 266,	2531, see page 401.
365, 651, 714.	4160, see page 737.
1024, see page 413.	4273, see page 562.

STATUTES CITED AND CONSTRUED—Continued.

Section 4290, see page 562. 9827, see page 673.
7877, see page 104. 9832, see page 673.
7957, see pages 104, 105, 9833, see pages 673, 674.
9824, see page 673. 9835, see pages 673, 674.

Revised Statutes 1889.

Section 3318, see page 582. Section 5857, see page 411.
5856, see pages 411, 413. 6570, see page 737.

Revised Statutes 1879.

Section 148, see pages 723, 724, Section 168, see page 746.
725. 3126, see page 736.
1 Wagner's Statutes (1870), p. 440, sec. 7, see page 736.
2 Wagner's Statutes (1870), p. 1062, sec. 26, see page 748.

Revised Statutes 1855.

Sec. 1, p. 1599, see page 729.
Sec. 9, p. 1601, see pages 725, 727, 729.
Sec. 55, see pages 632, 745.

Laws 1911.

Page 10, see page 587.
Page 19, see page 586.
Page 189, see pages 600, 601, 602, 603, 604, 605, 607, 608.
Page 271, see page 103.
Page 331, see pages 576, 577.

Laws 1909.

Page 602, see pages 103, 104, 105, 108.

Laws 1907.

Page 94, see pages 235, 236, 237, 240, 241, 242, 243, 244, 245, 248.
Page 815, see pages 109, 110.

Laws 1905.

Page 131, see pages 620, 621, 622, 623, 624, 627, 628, 637.

Laws 1901.

Page 189, see pages 103, 104, 105.

Laws 1891.

Page 75, see page 418.

Laws 1885.

Page 190, see page 787.
Sec. 4, see page 742.

Laws 1883.

Page 111, see page 737.

Laws 1877.

Page 229, see pages 735, 736, 740, 741, 742, 743, 745.
Page 230, see pages 723, 725, 726, 727.

Laws 1840.

Page 54, see page 729

SUMMONS.

1. **Process to Another County.** The probate court of the county of such person's residence has jurisdiction to send its process to the county in which such person is confined and have it served there. *Ex parte Zorn*, 267.
2. **Process: General Statute: Section 3863.** Although the statute does not expressly authorize probate courts to send their notices or writs to other counties to be served upon persons sought to be declared insane, yet as probate courts are a part of the judicial system of the State and are empowered by the Constitution to pass upon the sanity of persons, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law; and that has been done by Sec. 3863, R. S. 1909, declaring that "all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law." *Ib.*

TAXES AND TAXATION.

1. **Void Proviso: Decision Limited to That: Museum of Fine Arts.** The case of *State ex rel. Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis*, 216 Mo. 47, was directed to holding invalid the proviso in section 3 of the Act of 1907, which turned over to a self-perpetuating board of an auxiliary branch of Washington University, the tax authorized by the act to be levied and collected, and was not meant to hold and did not hold that the whole act was void, if the administrative board to manage the fund was appointed by the mayor in the manner provided by the words of that section preceding that proviso. It was not held in that case that the act was passed for the mere purposes of the proviso, that is, that the tax was to be levied and collected for the use of the board of control of the St. Louis School of Fine Arts, which was an auxiliary, assistant to the board of Washington University. The effect of that decision was that the taxes so collected could not be turned over to that board of control, which was the relator, suing for the fund in that case. The case is *stare decisis* only to the point of holding the proviso unconstitutional. The rest of the act was not held in judgment in that case. *State ex rel. v. St. Louis*, 231.
2. **Museum of Art Tax: Proviso Invalid: Rest Valid.** The Act of 1907, authorizing the city of St. Louis to levy and collect a one-fifth mill tax for a public art museum, and providing that when said act shall have been approved by a vote of the people the mayor, with the approval of the municipal assembly, shall appoint an administrative board of nine members to control the expenditure of the art museum fund, is this far constitutional; but the proviso, namely, that if there be already in such city a legally constituted administrative board of public property devoted by law to the uses of an art museum (referring, as a matter of fact, to an existing board of control of an art museum which had become a part of Washington University), "such board and its successors shall be the board of control of the art museum," and have and expend the public tax, is invalid. But it cannot be said that the proviso furnished the whole legislative inducement for the act, and the invalid proviso being separable from the rest, and ancillary thereto, the rest is valid and constitutional; and it is the duty

TAXES AND TAXATION—Continued.

of the city, since the act has been approved by the people, to levy the tax, and of the mayor to appoint an administrative board. *Ib.*

TENDER OF PAYMENT. See *Satisfaction.*

TRUSTS. See *Quo Warranto.*

TRUSTS AND TRUSTEES.

1. **Resulting Trust: Proceeds of Wife's Land: Presumption.** As the law stood in 1867 the husband had a right to reduce to his possession, and to become the absolute owner of, the proceeds of a sale of his wife's real estate not held by her as a separate estate; and if he used the money arising from a sale of her land to purchase other land and took the title in his own name, it will be assumed that he intended to reduce the money to his possession and did so with her consent, in the absence of a showing of any agreement between them that he took the property as her agent or trustee. *Williams v. Keef*, 366.
2. ———: **Long-Settled Titles.** It is not the policy of the law to allow long-settled titles to be easily disturbed. The evidence should be strong enough to remove all doubt that the husband, who used the proceeds of the sale of his wife's land to buy other land and took the title in his own name, in whom it was permitted to remain for thirteen years prior to his death and twenty-seven years thereafter, did not intend to reduce said proceeds to his own use, but in taking the title in his own name was acting as her agent or trustee. *Ib.*
3. ———: **Evidence: Proximity of Sale and Reinvestment.** The fact that the husband and wife sold her land, and two days later he bought another tract and took the title in his own name, does not afford a basis for an inference strong enough to overcome the presumption that he intended to convert the money to his own use and that she assented thereto. *Ib.*
4. ———: **Old Recollections.** Recollections of casual remarks made by a deceased grantee as to the actual owner of the land, made from twenty-eight to forty years prior to the trial, are extremely unreliable as tending to establish a resulting trust. *Ib.*
5. **Trust Estate: Absolute Deed: Pleading: Proof.** A petition alleging that the owner of land conveyed it in trust, to be held by the grantee for the grantor, and that thereafter, at the grantor's request, the said grantee conveyed it in trust to defendant to be held by her for the use of said grantor and his heirs, states a cause of action, without an allegation that such trust was evidenced by some writing. That it was not created by a writing is a matter of defense, or is to be raised by objection to the evidence offered to prove the trust. *Mugan v. Wheeler*, 376.
6. ———: ———: **Parol Proof.** Deeds absolute and unconditional on their faces cannot be shown by oral evidence to be conveyances in trust. The statute requires an express trust to be evidenced by some writing—which may be either the conveyance itself, or a separate writing. *Ib.*

TRUSTS AND TRUSTEES—Continued.

7. **Contract: Fiduciary Relation: Insurance Company: Agent.** A general agent for an insurance company made a contract with the company by the terms of which all funds received by the agent were trust funds, not to be used by the agent, but to be remitted to the company. *Held*, that the relation thus formed was a fiduciary one, which was not altered in practice by the fact that when the agent settled with the company under his previous contract containing the same terms, he failed to account for certain first-premium notes and the company allowed him special favors in order to pay for those notes, and that an official of the company soon after the making of the last contract directed the agent to cash all premium notes at once—and this view is strengthened by the fact that after the last contract was made the company wrote the agent a letter calling his attention to the fiduciary clause, censuring him for selling a premium note and failing to reimburse the maker when rejected, and warning him that his conduct was an unlawful conversion of another's property. *Hanna v. Insurance Co.*, 383.
8. **Principal and Agent: Insurance: Authority to Sell Premium Notes.** Authority to a general insurance agent to sell premium notes is not permission to convert the proceeds to the agent's own use. *Ib.*
9. **Embezzlement: Trust Fund: Failure to Account: Evidence.** The statute defining embezzlement does not make the failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund. The failure to account may, however, be material evidence tending to establish the act of conversion. *Ib.*
10. ———: **Definition.** Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. *Ib.*
11. ———: **Proof Covering Part Only of Sum Charged.** The general agent for an insurance company was prosecuted for embezzling three first-premium notes. He took these notes payable to himself, immediately cashed them, paid the sub-agents their commissions and, in violation of his contract with the company making all funds in his hands fiduciary, converted the remainder to his own use. When the applications with which the three-premium notes were taken, were rejected, the sub-agents refunded to the general agent. The agent asserted upon the trial that before this refunding by the sub-agents he had made a claim against the company for reimbursement for sums advanced on account for sub-agents in other transactions and that therefore the money so refunded to him could be retained and he could not be guilty of embezzlement because the whole amount charged had not been converted. *Held*, that a prosecution for the embezzlement of a certain sum can be sustained by showing the embezzlement of any portion of that sum. *Ib.*
12. ———: **When Offense is Completed: Efforts to Atone.** The offense of embezzlement is complete at the time of conversion and is not tolled by subsequent claims or efforts at atonement. *Ib.*

TRUSTS AND TRUSTEES—Continued.

13. ———: **Conversion: Evidence: Criminal Intent.** Where in a prosecution for embezzlement the admitted facts show a conversion of part of the items charged before any counterclaim was made or entertained by the defendant, such conversion is a fact from which the jury would be authorized to infer a criminal intent. *Ib.*

VENUE.

Insane Person: County. The probate court of the county of the residence of the person alleged to be insane, and not that of the county in which he is being confined in a state hospital as a private patient, is the proper court to conduct the inquiry into the alleged insanity of such person. *Ex parte Zorn*, 267.

VERDICT.

1. **Excessive: \$10,000.** Plaintiff, nineteen years old, a school teacher, while walking on a railroad track, was struck by a train. She was taken up unconscious, remained unconscious for days, was injured on her head, an arm and leg were broken, she was disfigured, one of her feet and the toes of that foot are drawn out of place, making her club-footed and lame, one arm is crooked and there is a catch in the elbow of it, and she is a cripple for life. *Held*, that a verdict for \$10,000 is not excessive. *Dutcher v. Railroad*, 137.
2. **Instruction: General Verdict: Separate Offenses.** Burglary and larceny may be joined in the same information, but they are separate and distinct offenses, and upon a trial the jury may acquit of both, or convict of both, or convict of one and acquit of the other; and an instruction that requires them to convict of both or acquit of both, with no instruction or provision for separate verdicts, is error. *State v. Conway*, 271.

VOLUNTARY PAYMENT. See *Payment*.

WAIVER.

1. **Demurrer: Waived by Thereafter Offering Evidence.** Defendant's demurrer asked at the close of plaintiff's evidence is waived by offering evidence in support of its answer at the close of plaintiff's case and after its demurrer has been overruled. If at the close of all the evidence such demurrer is renewed, it will be considered on appeal, but will be viewed in the light of all the evidence in the case. *Cook v. Pulitzer Pub. Co.*, 326.
2. **Payment: Waiver, by Beneficiary.** The return to a beneficiary of a policy of insurance upon which a loan had been made, with an indorsement upon the policy that it should be taken for a certain amount of paid up insurance, and the retention of the policy for some time by the beneficiary, does not constitute a waiver of the beneficiary's right to demand a further sum due her under the policy, when she had no knowledge of her legal rights thereunder, never accepted the sum tendered her, transacted none of the business relating to the insurance, and had done nothing, in fact, except to place the policy, when returned, among the papers of the insured. *Head v. Insurance Co.*, 403.

WITNESS.

Coindictee: Not indorsed on indictment. A witness who was jointly charged by information with defendant, and whose name is not indorsed on the information, is competent to testify for the State in the separate trial of defendant, after a *nolle prosequi* has been entered as to such witness. State v. Conway, 271.

Rules for the Government of the Supreme Court of Missouri.

RULE 1.—Chief Justice, His Duty. The Chief Justice shall superintend matters of order in the court room.

RULE 2.—Motions to be Written, Signed and Filed. All motions in a cause shall be in writing, signed by counsel and filed of record.

RULE 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

RULE 4.—Diminution of Record, Suggestion After Joinder in Error. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 5.—Application for Certiorari. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

RULE 6.—Reviewing Instructions. For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form avoiding repetition and omitting all immaterial matter.

RULE 7.—Bill of Exceptions in Equity Cases. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence may be reduced to a narrative form where this can be done and at the same time preserve full force and effect of the evidence.

RULE 8.—Presumption in Support of Bill of Exceptions. The only purpose of a statement, in a bill of exceptions, that it set out all the evidence in the cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

SUPREME COURT RULES.

RULE 9.—Making up Transcripts. The clerks of the several circuit courts and other courts of the first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (*e. g.*): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading or part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

RULE 10.—Words Appellant and Respondent, What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff and defendant in error and other parties occupying like positions in a cause.

RULE 11.—Abstracts in Lieu of Transcript, When Filed and Served. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in the court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time. (As amended February 26, 1895.)

RULE 12.—Abstracts, When Filed and Served. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file ten copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

SUPREME COURT RULES.

RULE 13.—Abstracts, What They Shall Contain. The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there are no questions made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

RULE 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

RULE 15.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the pages where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

SUPREME COURT RULES.

RULE 16.—Failure to Comply With Rules 11, 12, 13 and 15. If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the cost of the party in default.

RULE 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order, or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the Supreme Court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the Attorney-General, and, thereupon the Attorney-General shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file typewritten briefs and statements. In cases in which the tran-

SUPREME COURT RULES.

script has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

RULE 20.—Taking Record From Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

RULE 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *in banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

RULE 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

RULE 24.—A motion to transfer a cause under the provisions of the Constitution from either division to court *in banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

RULE 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the court *in banc* as such division or judge in vacation may order.

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RULE 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the court *in banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the court *in banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

RULE 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

RULE 28.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after January 1, 1902, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable, and when the appellant for any reason can not or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899. (Adopted at October sitting, 1901.)

RULE 29.—The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceeding, and fifty minutes for respondent or defendant in error or respondent in original proceeding. (Adopted at the January sitting, 1912.)

Rule 30. All motions, briefs, letters or communications in anywise relating to a matter pending in this court must be addressed to its clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties. (Adopted at the July sitting, 1912.)

Rule 31. All rules not included in the foregoing enumeration are hereby rescinded.

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